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THE ELEMENTS

OF

INTERNATIONAL LAW

WITH

AN ACCOUNT OF ITS ORIGIN, SOURCES AND HISTORICAL DEVELOPMENT

BY

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PREFACE TO THE REVISED EDITION

THE favorable reception accorded to the first edition of this work, and the constant and extensive use which has been made of it by the class for which it was originally intended—the undergraduate students of American colleges and law-schools—have suggested the propriety of a general revision of the text, and the insertion of some of the more important cases to which the international experience of the last fifteen years has given rise. The volume remains, what it was intended to be from the first, a text-book for the use of students; it is in no sense a manual, still less does it profess to be an exhaustive treatise. More extensive reference has been made in the text to decided cases and to the work of text-writers of approved and generally recognized authority; but the references at the end of each chapter have been retained, as a guide for general reading and for assistance in post-graduate work.

Nothing marks more decisively the advance which has been made in the scope and thoroughness of college work in recent years than the demand for illustrative cases, and for more copious and extensive references to original sources of authority. These sources of information, in libraries and collections of state papers, are becoming each year more accessible to students and to the reading public, by whom they can be consulted for purposes of reference or comparison. In the systematic study of the subject it is suggested that Doctor Francis Wharton's exhaustive and invaluable Digest of the International Law of the United States be habitually used in

connection with the excellent volume of Cases in International Law prepared by the late Professor Franklin Snow of Harvard University. The standard works of Phillimore, Hall, Woolsey, and Lawrence in English, Calvo and Pradier-Fodéré in French, and Holtzendorff in German, should be frequently consulted for purposes of comparison and reference.

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THE ELEMENTS
OF
INTERNATIONAL LAW

CHAPTER I

DEFINITION AND HISTORY

Law in General; Classification. In its most general acceptation, the term "law" is applied to the rule or principle which underlies or controls a sequence of events. Used in this wide sense, however, the definition is too broad, since the term is made to include the rules which control the forces of nature in their operations, as well as those which regulate the conduct of men in the organized societies, or bodies politic, which we call "states," and it is upon this distinction that the first classification is based. To the rules, therefore, which control the material phenomena of nature, we give the name of "physical" or "natural" laws; to those, on the other hand, which govern the conduct of men in organized societies we give the name of "political laws." Political laws are also subject to classification according to their source, their authority or scope, and the parties subject to their operation; those which control the relations of citizens to the state and to each other are called "national" or "municipal" laws; while those which regulate the intercourse of sovereign states with each other are known as "international" laws. The parties to the

former are the citizens or subjects of a particular state; the parties to the latter are sovereign states.[1]

Municipal Law. Municipal law may therefore be defined as comprising those rules of human conduct which are established or sanctioned by a state, in virtue of its sovereign authority, for the guidance and direction of its citizens or subjects. The municipal law of a state applies, as will subsequently appear, not only to citizens, properly so called, but to all persons, whatever their nationality, who come within its territorial limits as travellers or sojourners. As such persons are protected by the local municipal law, it is their duty to conform to its requirements during the period of their residence within its borders.[2]

International Law. International law, or, as it is sometimes called, the "law of nations," may therefore be defined as that body of rules and limitations which the sovereign states of the civilized world agree to observe in their intercourse and relations with each other.[3] The agreement or consent, which

[1] Pomeroy, Int. Law, §§ 47–50; Lawrence, Int. Law, §§ 42–55.

[2] The municipal law of many, if not most, states is not restricted within the narrow limits prescribed in the foregoing definition, since it includes, in addition to the statutes, or other enactments of its law-making power, a large body of unwritten, but none the less binding, provisions, derived, in part from customs and usages rigidly adhered to for long periods of time, and, in part, also, from maxims, presumptions, judicial decisions, and other authoritative sources, which, by long continued acquiescence and observance, have acquired the force and sanction of written laws. To this class belong the common law of England and the United States, the sea laws of the Middle Ages, the admiralty law of the civilized world, and the usages of business which are recognized by the jurisprudence of the states of Christendom.

[3] The term "international law," first brought into general use by the English publicist Bentham, seems to have replaced the older expressions "law of nations," "jus inter gentes," "laws of war and peace" and the like, which were used by the earlier writers in their treatises on the subject. The definitions of the term indicate, on the whole, a substantial agreement among authors as to the nature of international law and the field of its application. Grotius gives the following explanation of the term: "As the laws of each state respect the benefit of that state; so among all or most states there might be, and in fact are, some laws agreed on by common consent, which respect the advantage, not of one body in particular, but of all in general." And this is what is called the "law of nations," when used in

is essential to the validity of a rule of international law, is said to be *express*, or *positive*, when it is embodied in treaties, or formal declarations of public policy, or in statutes which are enacted in support, or recognition of the accepted usages of nations; it is said to be *tacit* when it takes the form of conformity to the approved practice of states in their international relations.

distinction to the "law of nature." Grotius: Rights of War and Peace, preliminary discourse, § 18, p. 20. Vattel, after assuming that the "law of nations was originally no other than the law of nature applied to nations" (a common misconception of the time in which he wrote), declares that "we call that the necessary law of nations which consists in the application of the law of nature to nations. It is necessary, because nations are absolutely bound to observe it. This law contains the precepts prescribed by the law of nature to states, on whom that law is not less obligatory than on individuals, since states are composed of men, their resolutions are taken by men, and the law of nature is binding on all men, under whatever relation they act." Vattel, prelim. chap. § 7.

"International law, as understood among civilized nations," is defined by Wheaton "as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent." (Elements of International Law, § 14.) It is defined by Woolsey as "the aggregate of the rules which Christian states acknowledge as obligatory in their relations to each other, and to each other's subjects." (Woolsey, § 5.) Pomeroy, who regards it as a system of international morality, defines it as consisting "of those rules founded upon justice and equity, and deduced by right reason, according to which independent states are accustomed to regulate their mutual intercourse, and to which they conform their mutual relations." (Pomeroy, Int. Law, § 291.) Phillimore, one of the ablest English writers on the subject of international law, gives the following definition: "From the nature of states, as from the nature of individuals, certain rights and obligations towards each other necessarily spring; these are defined and governed by certain laws. These are the laws which form the bond of justice between nations—*quae societatis humanae vinculum continent*—and which are the subject of international jurisprudence and the science of the international lawyer." I Phillimore, Int. Law, chap. i. §§ 8, 9. For other definitions, see I Halleck, chap. ii. § 1; Westlake, p. 1, chap. vi. pars. 1–9; Walker, p. 44; Ibid. Manual, chap. i. § 1; Manning, Law of Nations, p. 2; Wildman, Institutes, pp. 1–3; Creasy, § 1; Snow, Int. Law, p. 17; Lord Coleridge, in Reg. *vs.* Keyn, 2 Exch. Div. 63, 153; Maine, Int. Law, pp. 13–25; Bluntschli, p. 55; Klüber, § 1; I De Martens, § 4. For a criticism of the various definitions of the term, see I Pradier-Fodéré, pp. 2–16; Heffter, § 1; Lawrence, Int. Law, § 1; Westlake, p. 1; Hall, int. chap. p. 1; Revue de Droit Internat'l, vol. xvii. p. 517; Holtzendorff, §§ 1–20.

International and Municipal Law Compared. The essential difference between the two systems of law will be found to consist in the extent and character of the binding force of each. The sovereign authority of a state sanctions its municipal laws and, within its territorial limits, enforces obedience to their provisions. As sovereign states acknowledge no common superior, it is obvious that there is no authority above a state, or outside of it, which can effectively coerce it into obedience to the provisions of international law. An individual who suffers an injury, or whose personal or property rights are invaded, seeks and obtains redress in the courts of his country, which are authorized to hear and decide his case, and are given power to enforce their judgments and decrees. If, on the other hand, a nation be injured or invaded by another, or have a cause of difference with a foreign state, it cannot appeal to an international tribunal of any kind to remedy its wrong or to adjust its difference, but must seek redress by remonstrance or negotiation, or, as a last resort, by war, when all peaceable methods of adjustment have failed.[1]

History of the Science

The Oriental Monarchies. International law can hardly be said to have existed in ancient times. The absolute and crudely organized Eastern monarchies were intolerant of the very existence of neighboring nations, and lived in a state of constant warfare with them. Of distant nations they knew nothing, and as there must be communication or intercourse of some kind between states in order that the rules may be deduced which govern their relations with each other, it was impossible that a science resembling international law could have existed among them.[2]

[1] I Halleck, pp. 48–50; Risley, § 3; Woolsey, §§ 2–5; I Phillimore, chap. i. introduction; Wildman, pp. 29–32; Ortolan, liv. i. chap. iii.; Smith, Elementary Law, § 1.

[2] The object of their founders was to gratify ambitious display on a great scale and to increase the area from which they could take their taxes; but, nevertheless, no one could say how much war they extinguished by the prohibition, which they undoubtedly carried out, of hostilities among the

Greece. The Greeks acknowledged the independent existence of other states, both within and without the Hellenic peninsula. They had an extensive commercial intercourse with them and, upon important occasions, sent and received ambassadors and diplomatic agents. The pressure of circumstances obliged them, at times, to enter into offensive and defensive alliances with each other, and some of their later confederacies were highly organized and possessed many elements of permanency. All foreigners, however, were known to them as barbarians; their customs in war were extremely cruel, and breaches of faith were too common to favor the growth of a science which depends, to a higher degree than any other, upon the sacred observance of agreements and promises.[1]

Rome. The Romans differed from the Greeks in that their intercourse with foreign nations was so great in amount, and so diversified in character, as to enable a crude system of rules to be deduced from their international experience, by which they conceived that their reciprocal intercourse with other states was regulated and controlled. In discussing the status of international law among the Romans, however, it is necessary to distinguish between the well-known foreign policy of the republic, which aimed at and finally secured universal dominion, and the crude and imperfect system, known as the *jus feciale*, which, during the greater part of the republican period, was believed to control their strictly external relations.

The Jus Feciale. The *jus feciale* was, in substance, a set of rules which determined the duties of the members of

various subdivisions of their subjects. Maine, Int. Law, p. 10; Ibid. Early History of Institutions, pp. 371–400; Holtzendorff, §§ 40–48; Klüber, § 10; Bluntschli, int. pp. 11–13; I Azuni, art. ii. pp. 24–36; Hosack, pp. 1–7; Revue de Droit International, vol. xvii. pp. 280–281.

[1] Westlake, Int. Law, pp. 17–19; Holtzendorff, §§ 49–54; Levi, p. 9; Walker, Science of Int. Law, pp. 58–61; Bluntschli, int. pp. 11, 12; Klüber, § 10; Risley, pp. 11–13; I Halleck, ch. i. § 3; I Phillimore, int. p. 45; Manning, p. 9; Woolsey, § 8; I Ward's Inquiry, pp. 171–200; I De Martens, § 10; Hosack, pp. 1–15; Lawrence, Int. Law, § 21; Revue de Droit Int., vol. xvii. p. 281. Foreign Relations of the United States, 1877, p. 289.

the Fecial College, whose principal function it was to give effect to formal declarations of war which had received the sanction of the popular assembly having authority, under the constitution of the republic, to make them. They also gave advice upon questions respecting war and peace, acted as heralds and ambassadors, and received and entertained the envoys and ministers of foreign states.[1] The college ceased to exist in the early part of the imperial period; the powers and duties of its members being merged in the general authority of the emperor.[2] It is proper to observe, also, that the policy of constant territorial expansion which was pursued by the Romans from the earliest times, and was steadfastly adhered to until the empire included within its borders the entire civilized world, interposed a barrier to the establishment of states upon independent foundations, and thus operated to prevent the development among them of a system of international law in the modern acceptation of the term.[3]

The Decline of the Empire. It has been seen that the gradual subjection of the civilized world to the dominion of Rome, while it arrested the development of international law, operated, so long as it existed, to render such a system of law unnecessary. The obliteration of independent states, by their gradual absorption in the empire, put an end to all interstate intercourse and terminated those mutual relations which it is the function of international law to regulate; while the maintenance of peace within its borders made war impossible, save with the barbarous races to the north and east, who had come to be regarded by the imperial government as its constant enemies. This state of affairs culminated in the age of

[1] Holtzendorff, § 60; Hosack, pp. 16–20.

[2] There are believed to be no instances on record of the performance of fecial duties subsequent to the reign of the Emperor Tiberius.

[3] Manning, pp. 9–12; Heffter, § 6; Walker, Science, pp. 61–63; I Halleck, ch. i. §§ 3, 4; Woolsey, § 8; Pomeroy, § 12; I Phillimore, int. pp. 45, 46; Maine, Int. Law, p. 13; Levi, pp. 10–11; Westlake, pp. 18–23; Bluntschli, int. pp. 12, 13; Holtzendorff, §§ 57–64; I De Martens, § 10; Klüber, § 10; Risley, pp. 13–15; Ward's Inquiry, pp. 171–200; Hosack, pp. 16–22; Revue de Droit International, vol. xvii. p. 278.

Augustus, which witnessed the establishment of the Roman peace, and the extension of Roman territory to a series of strong natural boundaries, beyond which the imperial power was feared and respected and within which its authority was supreme.

As the empire grew steadily weaker, it became each year less able to maintain internal order and to resist the inroads of the barbarous tribes which were a constantly growing menace to its territorial integrity until, towards the close of the fifth century of the Christian era, and as a consequence of their repeated incursions, the Romans ceased to be the dominant race in the West, giving place to the various Germanic nations which had established themselves within its former boundaries.[1]

The Dark Ages. From the downfall of the Western Roman Empire until the close of the Dark Ages a slow but gradual development of the science can be traced, chiefly in the history of the Mediterranean cities, which maintained more or less intimate commercial relations with each other during that period. Some of these cities had survived the wreck of the empire, and had maintained their corporate existence during the inroads of the Teutonic invaders. Others had been founded from time to time, especially during the period of revival of civilization. Such of them as had endured the evil effects of the feudal system did so with extreme difficulty, and it was not until those effects had in some degree passed away that the elements of civilization, which had been preserved among them, began to increase, and to exercise an influence upon the rude society by which they were surrounded. The first signs of a revival began to appear towards the close of the Dark Ages, and were manifested in the marked interest shown in the revival of manufactures, and the establishment and extension of commercial intercourse.[2]

[1] Westlake, pp. 23–29; Hosack, pp. 23–27; Lawrence, Int. Law, § 24.

[2] Wheaton, History, pp. 16–23; Ibid. Elements of Int. Law (preface to third edition), pp. 15, 16; I Halleck, ch. i. §§ 5, 6; I Ward, Inquiry, pp. 211–236; Woolsey, § 8; Maine, Int. Law, pp. 10, 11, 16, 17; Walker, Science, pp. 63–68; Bluntschli, p. 13; Klüber, § 11; Holtzendorff, §§ 65, 79.

Effects of the Revival of Commerce. Commerce, and especially maritime commerce, cannot long be carried on without its participants agreeing upon some rules for its protection and regulation. All ships engaged in it are exposed alike to the depredations of pirates and the perils of the sea. The necessity of policing harbors, of lighting dangerous coasts, of maintaining adequate port facilities, and of providing some means of enforcing maritime contracts, must also have received early attention. As the Mediterranean cities were themselves independent, or were situated in different states, and acknowledged no common superior, such rules, to have been regarded as obligatory, must have commended themselves to those engaged in commercial pursuits, must have existed with their tacit or expressed consent, and their binding force could have endured only so long as they were generally regarded as just and equitable.

Early Codes of Maritime Law. Primitive codes of maritime law, fulfilling most of these conditions, and so possessing some of the characteristics of international law, are found to exist in the early sea-laws of the commercial cities of southern and western Europe.[1] The most important of these were:

(*a.*) *The "Judgments of Oléron."* This was a body of regulations governing the navigation of the western seas, and is believed to have been drawn up in the eleventh century.[2] Its authority was long recognized in most of the Atlantic ports of France, and for this reason portions of it were incorporated in the Maritime Ordinances of Louis XIV.[3]

(*b.*) *The "Consolato del Mare,"* or "Customs of the Sea," was a more extensive collection of rules applicable to the decision of questions arising in commerce and navigation, both in peace and war. It also contained rules defining the rights of belligerents and neutrals, as they were then sanctioned and understood. It was probably drawn up in the twelfth century, the earliest authentic copy having been published in Barce-

[1] I Azuni, Maritime Law, pp. 253–379; Dominion of the Sea, pp. 116–119.

[2] Ibid.

[3] Dominion of the Sea, London (1707), pp. 116–119, 120–173.

lona in 1494.[1] Its authors are unknown, but their work exhibits a thorough knowledge of the Roman maritime law, of the early maritime customs of the commercial cities of the Mediterranean, and of the principles of contract, as applied to trade and navigation. Great weight was attributed to the work by the commission to whom Louis XIV. intrusted the preparation of his celebrated Maritime Ordinances. As showing its general acceptance among maritime powers, Grotius speaks of the "Consolato del Mare" as containing the constitutions of France, Spain, Syria, Cyprus, the Balearic Isles, Venice, and Genoa.[2] Its provisions on the subject of prize law, besides the concurrence of the states above named, coincided with all the treaties relating to their provisions made during several succeeding centuries,[3] and they agree at present with the maritime codes of Europe, notwithstanding many attempts to reverse their regulations.[4]

(*c.*) *The "Guidon de la Mar."* This is a work of somewhat less comprehensive character than the "Consolato del Mare," and is of considerably later date. It was drawn up towards the close of the sixteenth century, at the supposed instance of the merchants of Rouen. It treats principally of the law of maritime insurance, the laws of prize, and contains a code of regulations governing the issue of letters of marque and reprisal.

Other Codes of Maritime Law. The "Maritime Law of Wisbuy,"[5] the "Customs of Amsterdam," the "Laws of Antwerp," and the "Constitutions of the Hanseatic League"[6] are names applied to bodies of sea-laws similar to those already described, which were recognized in the cities of northwestern Europe, on the North and Baltic seas.

These early systems had some elements in common. The authorship of none of them is fully known. The most gen-

[1] I Halleck, chap. i. § 13; Holtzendorff, §§ 76, 77; the oldest edition of the Consolato is in the Catalan dialect and was printed in Barcelona in 1502, by order of the consuls of that city, from ancient manuscripts. Wildman, Institutes, p. 20.

[2] Manning, Law of Nations (Amos edition), p. 15.

[3] Ibid.

[4] Ibid.

[5] Dominion of the Sea, pp. 174–190.

[6] Ibid. pp. 190–206; Holtzendorff, § 78.

erally accepted opinion is that they were drawn up by commissions of merchants or lawyers representing different cities, thus giving them in some degree the character of commercial treaties. All of them contain provisions extracted from the earliest-known maritime code, the Rhodian Laws, which were incorporated at an early date into the general body of Roman law, and were recognized and sanctioned by the emperors Tiberius and Hadrian.[1] In some of them the subjects of neutrality and neutral rights are so broadly and liberally treated as to leave but little room for improvement in the codes of more recent times. All of them evince, on the part of their authors, a familiarity with the Civil Law, and each, in turn, exercised a decided influence in the preparation of those which followed it.[2]

Development of International Law

The sea-laws, however, applied to but one phase of international relations—maritime commerce—and some of them had been in existence several centuries before the intercourse of states on land had become sufficiently general to make it possible to deduce any of its underlying principles, or even to formulate the common usages of states in peace or war. The nations of Europe during the period between the fourth and fifteenth centuries were in a formative, transition state, of which little detailed history remains. General causes were at work, however, some of which tended to favor, and some to retard, the growth of international law. Some of these were:

The Teutonic Migrations. The Germanic peoples who passed the Rhine and the Danube in the first five centuries of the Christian era, were, in the main, uncivilized tribes, or nations, whose migrations were due to the operation of two forces —one, constant, a desire to seek new homes in regions having a more genial climate and a more fertile soil than were to be

[1] Manning, pp. 14–21.

[2] Hosack, pp. 163–172; Pomeroy, § 40; Holtzendorff, §§ 75–78; Lawrence, Int. Law, §§ 27–29; Manning, pp. 14–18; Levi, pp. 13–15.

found in the inhospitable regions in which they were located when the movement began; the other, casual and occasional, but none the less powerful, the irresistible pressure of ruder and less civilized neighbors from the east. Their rulers were leaders in war only, whose title to command, derived from their valor or military capacity, was based upon the loyalty of their followers, who accompanied them less in the quality of soldiers than as companions in quest of new habitations. The conquests which they effected within the boundaries of the empire resembled more nearly acquisitions of land by a people in search of homes, than occupations of hostile territory as that term is now understood. As the number of the invaders bore a great proportion to the population of the Roman provinces which they occupied, and as the provincials were at the same time enervated by long peace, the expeditions were no sooner completed than all danger of resistance was at an end. After dividing among themselves such lands as they thought proper to appropriate, the invaders separated and gradually became merged, or amalgamated, in the population of the territories in which they had thus established themselves.[1]

The Feudal System. This institution, as a factor in the historical development of modern Europe, was the remote rather than the immediate consequence of the Teutonic migrations which have already been explained. The fiefs held, at first, in life tenancy, in time became hereditary in the families of their possessors, and the barons, aiming at complete political independence, and but feebly held in check by their feudal superiors, finally became practically supreme in their own domains. Without their territories they acknowledged, as will presently appear, a qualified allegiance to the Pope in spiritual affairs, and there was a similar recognition, in some instances, of the position and authority of the German em-

[1] De Lolme, Const. of England, pp. 148, 149; Church, The beginning of the Middle Ages, int. pp. 1–13; Manning, pp. 14, 18–21; Snow, § 2; Walker, Science of Int. Law, pp. 63–65; Holtzendorff, § 70; I Halleck, pp. 4–6; Bluntschli, int. pp. 15, 16; Risley, pp. 15–16; Hosack, pp. 23–26.

peror. Such recognition, however, was at best but slight in either case, and was not regarded by the feudal lords as constituting a serious restriction either upon their external independence or their internal authority. While the system lasted its effects were, on the whole, unfavorable to the growth of international law. Europe was divided into a large number of small states, or groups of states, ruled by dukes and barons, each in a condition of constant hostility with his neighbors. Intercourse by land was always difficult, and at times impossible; internal commerce could not exist, and the growth of towns, as centres of trade and manufacturing industry, was hampered and restricted. War was the rule, and peace the exception; the rules governing the operations of war were cruel and harsh in the extreme. Quarter was rarely given; the garrisons of besieged towns were put to the sword; prisoners of war were reduced to slavery; and so great was the mutual distrust of sovereigns that they maintained but little intercourse with each other, and obtained such information as they desired by questionable means—through agents or spies.

The system culminated when the modern states of Europe began to assume something of their present territorial form. The great monarchies could only grow in size and strength at the expense of the power and possessions of the feudal nobles, and so soon as the former were securely established the power and importance of the latter began to decline.[1]

The Institution of Chivalry. This came into existence during the feudal period; it was in great part an outgrowth of the Crusades and contributed powerfully to ameliorate some phases of the laws of war. Its code applied at first only to the conduct of knights towards each other; but, in so far as it recognized and practised, to some extent, the principles of Christianity, its effects were soon felt in the milder treatment of captives and slaves, and in the different and stricter

[1] Woolsey, § 8; Walker, Science of Int. Law, pp. 42, 43; Holtzendorff, §§ 72, 73; Ward, Inquiry, pp. 337–395; Klüber, § 11; Hosack, pp. 23–62; Lawrence, Int. Law, §§ 27–29; Revue de Droit International, vol. xxiii. pp. 541–560.

views which began to prevail in the matter of keeping faith with enemies and strangers.[1]

(*c*.) **The Roman Church.** Unquestionably the most powerful influence that was exerted upon the science of international law during its formative period was that of the Roman Church. As the political power of the Western Empire decayed, and finally disappeared, the Church, an organization having at once a religious and a secular aspect, became for a time the most powerful organ of civilization in that portion of western Europe which had formerly acknowledged the sway of the Roman emperors. Its authority was generally acknowledged and respected, and its ministers and bishops, in addition to their sacred functions, frequently found themselves called upon to perform duties entirely secular in character. Out of this state of affairs grew the *Canon Law;* a code based, to a great extent, upon the Roman law, but adapted to the peculiar exigencies of the Church and times. While intended primarily as a constitution for the government of the Church and the administration of its vast interests, its provisions were found to be applicable to the decision of a great variety of controversies, ranging in importance from the disputes of private individuals to the adjustment of difficulties of serious international concern.[2]

Ecumenical Councils; The Papacy. "The assembly of deputed representatives from the different Christian states gave to the ecumenical councils the character and composition of a sort of European Congress. Besides the settlement of articles of faith and the deposition, or excommunication, of princes, which were determined upon in these councils," [3] there were numerous instances in which their decisions were sought in purely secular affairs. There were also cases in which the Pope was made an arbitrator, or referee, in questions of inter-

[1] Holtzendorff, § 74; Hosack, pp. 79–130; Ward's Inquiry, pp. 155–230; Risley, p. 19; Woolsey, § 8; Manning, pp. 11, 12.

[2] Klüber, § 11; Maine, Int. Law, pp. 14–16; Bluntschli, int. pp. 13–15; Risley, pp. 15–19; Woolsey, § 8; I Halleck, pp. 6, 7; Levi, pp. 11–13; Holtzendorff, §§ 65, 66, 68; Manning, pp. 12–14; Lawrence, Int. Law, §§ 24, 25; Hosack, p. 29.

[3] Manning, pp. 12, 13; Hosack, pp. 29–60.

national controversy.[1] The bull of Pope Alexander VI., of May 4, 1493, fixing upon the meridian passing through a point one hundred leagues west of the Azores as a boundary between the colonial possessions of Spain and Portugal, is an example of the exercise of such arbitral authority on the part of the pope. By his subsequent approval of the treaty of Tordesillas, this line was fixed at the meridian passing through a point 370 leagues west of the most western point of the Cape Verde Islands.[2] The advantage that might have been derived from the papal interference would have been very great had it been an authority exercised for justice instead of abused for ambition.[3]

The Holy Roman Empire. It is a tribute to the profound influence of the Roman Empire upon the minds of men that the theory of universal sovereignty should have so long survived its downfall, and that it should have been deemed necessary in the Middle Ages to find a substitute for it in existing institutions. Such a substitute was found in the empire founded by Charlemagne, but with an important modification. The *temporal* head of Christendom was the German emperor; its *spiritual* head was the Roman pontiff; but, as the line of division was not sharply drawn, these personages often came into conflict, and the international law of the Middle Ages was influenced enormously by the conflicting claims of the pope and the emperor.[4] As the imperial power, at any time,

[1] Manning, pp. 12, 13. "At the Council of Lyons, convened by Gregory X., in 1274, the inhabitants of Ancona having contested the right of the Venetians to levy tolls, and exercise other rights of exclusive dominion in the Adriatic, the question was referred to the pope and was discussed. Judgment was given that the inhabitants of Ancona had no grounds for their complaints, and that the Venetians were possessed of the sovereignty of the Adriatic. None of the ambassadors or princes present at the council objected to the decision, and the judgment passed without any protest respecting its validity."—Ibid.

[2] For an exhaustive discussion of this incident, see the article entitled "La Ligne de Démarcation d'Alexandre VI.," by M. Ernest Nys, in vol. xxvii. of the Revue de Droit International, pp. 474–492.

[3] Manning, pp. 12, 13; I Selden, De Dominio Maris, chap. xvi.; Leibnitz, Opera, vol. iv. pp. 330, 331; II Ward's inquiry, p. 1.

[4] Lawrence, Essays on Modern International Law, p. 149; Holtzendorff, §§ 69, 71; Bluntschli, int. pp. 13–17.

depended largely upon the personal influence and character of the emperors, and as no line of political policy was long adhered to by them, the papacy, having a determined and well-settled policy, in time began to acquire a preponderance even in temporal affairs.

"The idea of a common superior still lingered among the nations, and greatly assisted the Roman pontiffs in their efforts to obtain a suzerainty over all temporal sovereigns. For as the empire founded by Charlemagne gradually decreased in extent till it scarcely extended beyond the limits of Germany, more and more difficulty was felt in ascribing to it universal dominion. Yet no one dreamed of asserting boldly that independent states had no earthly superior; and therefore, when the papacy came forward with its claims, men's minds were predisposed to accept them. As an arbitrator between states the pope often exercised great influence for good. In an age of force he introduced into the settlement of international disputes principles of humanity and justice, and had the Roman Curia always acted upon the principles which it invariably professed, its existence as a great court of international appeal would have been an unmixed benefit."[1]

Rise of the European Monarchies. During the period between the fourteenth and sixteenth centuries, and as a consequence of the decline of the feudal nobility, the great monarchies of Europe began to acquire strength and consistency, and to assume something of their present territorial form. These governments were absolute in character, and although some of them were at times administered with considerable liberality, in none were popular rights recognized, and none were limited by representative institutions. Not only were they absolute in form, but in most of them the idea of sovereignty had become associated with the person of the sovereign. He was the head of the state; the title to its territory and property was vested in him, and he was held to be able to dispose of it at will. Such restraints as were estab-

[1] Lawrence, Essays on Modern International Law, p. 149; Ibid. Int. Law, §§ 24–28; Holtzendorff, § 82.

lished upon the power of the sovereign had chiefly to do with internal affairs, and rarely extended to his foreign relations. He declared war, engaged in alliances, offensive and defensive, entered into treaty stipulations, increased or diminished his territories by sale, gift, or exchange, for such reasons as commended themselves to his judgment, or to his views of propriety or expediency; as a result diplomatic relations soon became common, alliances were entered into, agents were established at foreign capitals, through whom information was obtained as to the schemes and intentions of foreign powers. Embassies were sent and received, ambassadors maintained, and great wars were undertaken. Conquests were made, and territory changed hands; sometimes, as we have seen, as a result of war, sometimes after the manner of a transfer of property among private individuals.[1]

Such intricate and important international relations could not long exist without furnishing precedents of sufficient value to be cited in negotiation, or without some practices and usages acquiring, by frequent repetition or general consent, the binding force of international customs. The sea-laws furnished a basis upon which to erect a code of maritime law; their experience in war and negotiation furnished the states of Europe with an abundance of material for the preparation of a code of international usages, and the Roman law furnished a stock of legal maxims and principles with which to bind the whole fabric together.

The Influence of Grotius. At the close of this period, and at a most opportune moment in the history of the science,

[1] "It may here be noted that one favorable circumstance which facilitated the creation of a system of international law was the monarchic form of government which, up to very recent times, has universally prevailed in Europe. The state was bound up with, and to a certain extent lost in, the individuality and fortunes of its sovereign for the time being. The sovereign, on the other hand, by his acquisitions or losses, by his marriage, by his treaties, by his enmities, and by his wars, irreparably committed the state he represented, and his conduct in these respects was only to a small extent influenced by any constitutional forces within the state itself." Amos, Science of Law, p. 336; Holtzendorff, § 82.

there appeared the first authoritative treatise upon the law of nations, as that term is now understood. It was prepared by Hugo Grotius, a native of Delft, in Holland. He was a man of great learning, of considerable experience in public affairs, and a profound student of the Roman law; and his treatise, which was published early in the seventeenth century,[1] is, in substance, an application of its principles to the external relations of states. It was at once perceived to be a work of standard and permanent value, of the first authority upon the subject of which it treats. General Halleck justly observes with reference to it that it "has been translated into all languages, and has elicited the admiration of all nations and of all succeeding ages. Its author is universally regarded as the great master-builder of the science of international jurisprudence."[2]

Great as were the inherent merits of Grotius's work, however, it could never have exercised so decisive an influence upon state affairs as it did, had it not appeared at a time when the existing political conditions were especially favorable for its reception. The Thirty Years' War, then in progress, had been marked during its course by a refinement of barbarous cruelty, and by acts of atrocity perpetrated upon the unarmed and unoffending inhabitants of the valley of the Rhine, which stand without a parallel in the history of ancient or modern war. Many of the military operations had been undertaken rather with a view to the chance of pillage than from a desire to injure or defeat the enemy. Population had diminished, great tracts of territory had been laid waste, and commerce and manufactures had wellnigh disappeared.[3] With an experience of the horrors of war so bitter and long continued as that which Europe was then undergoing, it is not remarkable that men should have been willing to listen to any

[1] 1625.

[2] I Halleck, p. 12; I Twiss, int. pp. 17–21; Manning, pp. 23–31; Westlake, pp. 36–51; Walker, Science of Int. Law, pp. 91–111; Woolsey, §§ 31, 32; II Ward's Inquiry, pp. 606–628; Creasy, § 84; Lawrence, Int. Law, §§ 31–41.

[3] Gardiner, The Thirty Years' War, chap. xi. § iii. pp. 217–220; Lawrence, Int. Law, § 32; Holtzendorff, § 84; Hosack, pp. 173–226.

scheme which promised to mitigate the severity of war, or to lighten in any degree its terrible burdens.

But, great as the losses had been in men and material wealth, it may be doubted whether a desire to ameliorate the existing usages of war would have been, of itself, an agency sufficiently potent to bring about a reform of international law, had not another and a more powerful factor contributed directly to the same end. During the continuance of the Thirty Years' War, the purposes for which the war was carried on had undergone a complete change. The contest had originated in an attempt on the part of the Protestant princes of Germany to achieve their political and religious independence. In its later stages it had been transformed into a struggle for preponderance between France and Austria, and it had terminated, in 1648, to the complete advantage of the former power. In the course of the war the old idea of papal and imperial supremacy had finally disappeared. The ancient standard of international obligation had ceased to exist, and a newer and more enduring standard had to be erected in its place. As the idea of a common earthly superior was no longer recognized, it became necessary to invent a theory which, while conforming to existing political conditions, should furnish a safe and practicable rule for the conduct of interstate relations.

Such a scheme was that proposed by Grotius. The materials for his work were drawn from two principal sources, the law of nature[1]—the *jus gentium* of the Romans —and the

[1] The law of nature was a system of ethics, or morals, and was known to the Romans, in a rudimentary form, as the *jus naturæ;* as developed by later writers it was known to students in Grotius's time and still forms an important part in the courses of academic study in many states of Continental Europe and in the states colonized by them in Central and South America. See also Westlake, pp. 18–21; I Lorimer, Institutes, pp. 19–26; Wildman, pp. 2–14; Lawrence, Int. Law, §§ 31–36; Maine, Anc. Law, pp. 70–108.

The law of nature is defined in the Institutes of Justinian as that law which nature "has taught to all animals; a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the sea." Institutes, book i. title ii. par. 1. Wildman, pp. 2–14. The function which the so-called "law of nature" has performed in the development of the law of nations, is a proof, if

tacit or express consent of nations. The last of these sources of authority was believed by him to be merely supplemental to the first, and could ordain nothing contrary to it.[1] States, like men, were, from his point of view, controlled in their actions and relations by the operation of a law of nature as ancient as the universe itself. This law could be added to, but not modified. He believed it to constitute a standard by which the conduct of states and the actions of individuals could be finally judged; and he imagined that the Roman Empire afforded an historical example of its successful application in international affairs.[2]

such were needed, that, at the time at which the rules for regulating the mutual relations of states were beginning to be systematized, a prevalent conception existed of a great moral order in which states, like individual persons, must find their place. The exact requisitions which this moral order implied were indeed very obscurely perceived, and were drawn from quarters of the most opposite character. Thus the maxims of primitive Christianity were mingled with the conclusions of Middle Age casuists; and the prescriptions of knight-errantry with the suggestions of a rudely calculated expediency." Amos, Science of Law, 334. The terms *jus naturæ* and *jus gentium*, though closely allied in meaning, are by no means synonymous. The former was, as has been seen (page 18, note 1), a body of ethical principles; the latter was a system of jurisprudence. So long as a particular principle remained in the domain of ethics, it formed a part of the *jus naturæ;* so soon, however, as it came to be recognized as a legal rule of conduct, and had been sanctioned as such by the state and applied by the courts in the decision of cases, it became part of the *jus gentium*. Westlake, p. 22; Lawrence, Int. Law, §§ 30–36; Manning (Amos ed.), p. 10, note; Maine, Anc. Law, ch. 3, 4.

[1] The *jus gentium* is thus defined in the "Institutes of Justinian": "The civil law of Rome, and the law of all nations, are thus distinguished. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. Those rules which a state enacts for its own members are peculiar to itself, and are called the civil law; those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations." Institutes, book i. title ii. par. 2. See also Lawrence, Essays on Modern International Law, p. 179, and the title "The Roman Law" in the discussion of the sources of international law.

[2] When once the idea began to prevail, that the governors of the several states of Europe were subject to some body of laws, bearing an analogy to the national law of each state, there was no need for a long incubating process, during which the substance of the new (international) law should slowly acquire its true shape and size. The substance was fully developed, at once, in all its proportions. Amos, Science of Law, 333.

We now know that Grotius's theory of international obligation was in the main correct, however erroneous may have been his conception of its origin and sanction; and it is a remarkable tribute to the intrinsic excellence of his work that it has endured so successfully, for more than two centuries and a half, the assaults of destructive criticism and the crucial test of practical experience. None of the many ingenious theories which have been advanced in opposition to his have received even transient recognition, and upon the foundations so deeply and solidly laid by its immortal founder the fabric of the science securely rests.[1]

The Sources of International Law

The Roman Law. This is one of the earliest as it is in many respects the most complete and elaborate system of law that has ever existed. Most of the codes of municipal law now in force among the Continental states of Europe are either directly based upon it, or derive from it the greater part of the legal principles which they contain. As it was the only system of law with which the earlier writers on international law were familiar, and as its principles seemed to be sufficiently general, in character and scope, to apply to the reciprocal relations of states, its authority was frequently invoked by them in the preparation of their treatises.

The Jus Gentium. Like all ancient legal systems, the law of Rome was a development of the governmental experience of the Roman people, to whom its provisions exclusively applied. Such aliens and strangers as were resident in the city were, at first, without legal rights or privileges, and so long as Roman citizenship maintained its peculiar character of exclusiveness, the sanctions and penalties of the civil law were held to be binding upon Roman citizens alone.

As the alien class increased in numbers, as well as in wealth and importance, it became necessary to give to its members

[1] Wildman, pp. 22–24; Manning, pp. 24–29; Westlake, pp. 36–51; Walker, Science of Int. Law, pp. 91–107; I Halleck, chap. i. § 15; Holtzendorff, § 86; Lawrence, Int. Law, §§ 31–38.

a definite legal status, and to secure to them some measure of protection in their persons and property. "The expedient to which they resorted was that of selecting the rules of law common to Rome and to the different Italian commonwealths in which the immigrants were born. In other words, they set themselves to form a system answering to the primitive and literal meaning of *jus gentium*—that is, *law common to all nations*. The *jus gentium* was, in fact, the sum of the common ingredients in the customs of the old Italian tribes, for they were *all the nations* whom the Romans had any means of observing, and who sent successive swarms of immigrants to Roman soil. Whenever a particular usage was seen to be practised by a large number of separate races in common, it was set down as part of the *law common to all nations*, or *jus gentium*."[1]

"It is almost unnecessary to add that the confusion between *jus gentium*, or law *common* to all nations, and *international law* is entirely modern. The classical expression for *international law* is *jus feciale*, or the law of negotiation and diplomacy."[2] "No passage," says Sir Henry Maine, "has ever been adduced from the remains of Roman law which, in my judgment, proves the jurisconsults to have believed natural law to have obligatory force between independent commonwealths; and we cannot but see that to the citizens of the Roman Empire, who regarded their sovereign's dominions as conterminous with civilization, the equal subjection of states to the law of nature, if contemplated at all, must have seemed at most an extreme result of curious speculation. The early modern interpreters of the jurisprudence of Rome, misconceiving the meaning of the *jus gentium*, assumed without hesitation that the Romans had bequeathed to them a system of rules for the adjustment of international transactions."[3]

[1] Maine, Ancient Law, p. 47; Holtzendorff, § 64; Westlake, pp. 18–21; I Halleck, chap. i. § 4; Wildman, pp. 5–14; I Phillimore, §§ 36–38; Creasy, §§ 88, 89; Lawrence, Int. Law, § 38; Journal of Philology, vol. xiii. No. 26; Manning, p. 10, note; I Lorimer, chap. i.

[2] Maine, Ancient Law, p. 50.

[3] Ibid. p. 95. Morey, Outlines of the Roman Law, p. 207.

It is not necessary to suppose, however, that Grotius was mistaken, either in his view of the spirit of the Roman law, or in his application of its principles to states in their international relations. That system was the outgrowth of long experience, and its methods of dealing with the legal relations of individuals were elaborated with great care. From the stand-point of the civil law the Roman land-owner was regarded as an independent proprietor within the boundaries of his landed estate. It provided elaborate and adequate remedies, which were applied whenever his personal or property rights were trespassed upon or invaded, and it regarded all Roman landed proprietors as equal before the law. Grotius, in his great work, but applied these principles to sovereign states. Each state, according to his view, was independent within its territorial limits, and all states were equal in dignity and in the number of sovereign rights which they enjoyed, however unequal they may have been in power and influence.[1]

These principles lie at the foundation of modern international law, and such of its doctrines as have received general sanction are based directly upon them. It was thus easy for Grotius and his successors to deduce from the Roman law by far the greater part of the system of international law as it exists to-day. In its fundamental principles it has changed but little since Grotius's day. In its detailed rules it is undergoing a slow but constant modification; the tendency being towards greater liberality of view in the treatment of new questions as they arise, and in the modification or amendment of old practices, to adapt them to the conditions imposed by modern civilization. Like municipal law, it keeps pace with the development of the human race; it is affected by that development, and, in turn, reacts upon it, influencing the current of human events to a remarkable degree.[2]

[1] Amos, Science of Law, p. 338; Lawrence, Int. Law, §§ 31–38; Holtzendorff, §§ 57–64.

[2] Every improvement that is introduced into the rules of international law; every attempt that is made to produce uniformity, certainty, and publicity; every effort that is made after harmony of spirit and of interpretative method on the part of the public lawyers of different states—all point to the

Custom and Usage. The force of custom and usage in the regulation of conduct is as potent in the intercourse of states as it is in the affairs of individuals. When the acts of a state are criticised, the attempt is invariably made to justify them by a reference to approved precedents; so, too, when the correct line of governmental conduct is not quite clear, the attempt is made to support proposed courses of action by a similar reference to precedents. For this reason usages which, by long continued observance, have ripened into approved customs, acquire sanction as rules of international law. As the acts of the past are thus made to influence present conduct, it would seem to follow that the influence of custom, as a source of international law, would be extremely conservative; this is not the case, however, since a rule based upon custom must justify itself, not only by precedent, but must also conform to the moral standards of the present day. Otherwise customs and practices which are now universally condemned—such as slavery, the killing of prisoners in war, the pillage of undefended towns, and other cruel and inhuman practices—would be justified by custom and precedent. This is not the case, and a custom which does not conform to modern standards of humanity and enlightenment is without authority or value as the source of a rule of international law.[1]

Treaties and Conventions. As international law derives its binding force from the consent of nations, and as treaties are compacts, freely entered into, describing the conditions and defining the limitations which nations agree to observe in their intercourse with each other, it follows that they are of the highest authority in determining what that law is upon

gradual elaboration among states of what may be properly called a supreme political authority. What form this authority will take it may be impossible for us, in this generation, so much as to guess, just as the members of an early developing village community had no materials from which to construct a notion of civil government in its later sense. Amos, Science of Law, p. 326; Creasy, § 89.

[1] Manning (Amos ed.), pp. 80–82; I Halleck, p. 46; II Ibid. 461; I Phillimore, pp. 38–42; Woolsey, § 28; Vattel, prelim. chap. § 25; Walker, Science of Int. Law, pp. 12, 19–21; I Lorimer, pp. 27–37; Hall, pp. 6, 7; I Ortolan, p. 64; Holtzendorff, § 25; I Pradier-Fodéré, § 28.

any point covered by their stipulations. For example, many naturalization treaties stipulate for a period of residence, usually five years in length, as a condition preliminary to naturalization. This warrants the inference that a period of residence is a necessary preliminary to a change of national allegiance. Other treaties provide that consuls may, under certain circumstances, perform judicial acts in foreign ports. This warrants the inference that no such exercise of consular jurisdiction is lawful unless authorized by treaty stipulations.[1]

The Municipal Law of States. Much information may be derived from this source upon questions having at once a municipal and an international phase. Such is the case with the subjects of citizenship and naturalization, of neutrality, extradition, and piracy. The army and navy regulations of different states, and the rules adopted by them for the guidance of their diplomatic and consular representatives, throw light upon many questions of international usage.[2]

The Judgments of International Courts, or Boards of Arbitration. These tribunals are created for the express purpose of adjusting international disputes and differences. Their judgments, therefore, should constitute precedents as binding upon sovereign states as are the decisions of municipal courts upon individuals who carry their difficulties to them for adjustment.[3] The most conspicuous example of a resort to the principle of arbitration, as a means of adjusting an international difference, will be found in the operations of the Geneva Tribunal, a court created by treaty between Great Britain

[1] Manning, pp. 55–61; I Lorimer, pp. 37–51; I Halleck, chap. ii. § 28; Pomeroy, §§ 35–39; Hosack, pp. 131–162; Creasy, § 90; I Ortolan, pp. 79–103; Holtzendorff, §§ 26–28; I Phillimore, pp. 44–54; Wheaton, § 15, par. 2; Ward's Inquiry, pp. 231–358; I De Martens, Précis, §§ 13, 14; Woolsey, § 30; Glenn, § 5; Hall, int. chap. pp. 7–11; Lawrence, International Law, § 63; I Pradier-Fodéré, § 27; Walker, Science of International Law, pp. 49, 50, note.

[2] I Pradier-Fodéré, § 29; I Halleck, chap. ii. § 24; Holtzendorff, § 29; Wheaton, § 15, par. 3; Pomeroy, § 40; Woolsey, § 29; Glenn, § 6; I Phillimore, §§ 53, 54; Lawrence, § 66; Risley, pp. 28, 29.

[3] Creasy, §§ 86, 87; Lawrence, Int. Law, § 64; I Pradier-Fodéré, § 32; I Halleck, chap. ii. § 23; Risley, pp. 32, 33.

and the United States, to which was referred the adjustment of the important controversy known as the "Alabama Claims."[1]

The Decisions of Municipal Courts upon Questions of International Law. Although the courts of a state have chiefly to do with the decision of questions arising under its own municipal law, they are sometimes called upon to recognize and apply the rules of international law in the decision of particular cases. This is found to be necessary when the national character of an individual is drawn in question, or his capacity to perform certain acts—as to make contracts or to hold or transfer property. In the decision of what are called prize cases, which is usually an incident of the jurisdiction of admiralty courts, the law administered is almost exclusively international. The decisions upon questions of international law which have been rendered by Marshall and Story in the United States, and by Lord Stowell, Sir Robert Phillimore, and Dr. Lushington in England, are of the highest authority, and have been cited repeatedly as precedents in negotiation.[2]

The Diplomatic Correspondence of States; State Papers; Foreign Relations, etc. These are valuable sources of information upon all questions connected with the law and usages of nations. The opinions of law officers and attorneys-general to their respective governments, the correspondence of a state with foreign powers, and the reports of commissions created for the purpose of obtaining and digesting information upon special subjects, are examples of this class. Unfortunately much correspondence between governments is still regarded as confidential, and so is not easily accessible. England and the United States, however, publish at intervals the

[1] For a full discussion of the creation and operations of this tribunal, see the chapter entitled "Neutrality."

[2] Pomeroy, Int. Law, § 45; I Pradier-Fodéré, §§ 30–32; Holtzendorff, §§ 29–31; Walker, Science of Int. Law, pp. 46–56; I Halleck, chap. ii. §§ 22–25; Wheaton, § 15, par. 1; Wildman, pp. 36, 37; Glenn, § 5; Woolsey, § 30; Risley, pp. 32–35; I Phillimore, § 57; Lawrence, Int. Law, § 64.

greater part of their correspondence with foreign powers. The practice of other states in this respect is less uniform.[1]

General Histories; The Histories of Important Epochs; Biographies of Eminent Statesmen. From these sources much information may be obtained as to the history of the wars, negotiations, and treaties which have exercised a great, and sometimes decisive, influence upon the mutual relations of states and upon the development of the science of international law.[2]

The Works of Text Writers. The writings of those who have made the history and development of international usages a subject of special study will always constitute our chief source of knowledge upon the subject. The earlier writers were roughly grouped into two schools. One, made up chiefly of Continental authors, who were familiar with the Roman law, and by whom great authority was attached to the views of text writers. The other, composed of English and American writers, whose works, strongly influenced by the common law of England, attach the greatest weight to the decisions of competent courts and to the precedents established by the usages of nations and recognized by them as binding in their intercourse with each other. The present tendency is to obliterate this distinction. The history of both the Roman and common law has been exhaustively studied, and is now generally known, and the historical method of treatment is found to be as successful in its application to international as to municipal law.[3]

A decided unanimity of opinion among authors as to the reason or justice of a particular usage is strong evidence of its

[1] Manning, pp. 55–64; I Lorimer, Institutes, bk. i. ch. v.; I Halleck, ch. ii. § 30; Wheaton, § 15, par. 5; Pomeroy, § 41; Woolsey, § 30; Creasy, §§ 80–91; Lawrence, Int. Law, § 65.

[2] Wheaton, § 15, par. 6; Pomeroy, § 39; Creasy, pp. 88, 89; Glenn, § 5, par. e; Woolsey, § 34; I Pradier-Fodéré, § 26; Holtzendorff, § 39.

[3] Pomeroy, §§ 45, 46; Wildman, pp. 22–37; I Pradier-Fodéré, §§ 33, 34; I Halleck, chap. ii. §§ 26, 27; Wheaton, § 15, par. 1; Creasy, pp. 78, 80, 90; Glenn, § 5, par. b; Woolsey, § 30; I Phillimore, § 58; Holtzendorff, "Esquisse par A. Rivier," pp. 351–494.

general acceptance as a rule of international law. "Writers on international law, however, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it."[1]

International Public Opinion. This is one of the most potent, if not the most powerful, of the agencies now acting upon the development of international law. In proportion as civilization and enlightenment increase will the influence of public opinion increase as a factor in shaping the policy and practice of states and in formulating the rules of international law. Its effects can be seen in the abolition of obnoxious practices, of which the slave-trade is an example, in the restriction upon the traffic in coolies, in the prevention of aggressive wars, and in the advancement of arbitration as an agency for the solution of international differences.[2]

Divisions of International Law

Basis of Classification. The rules of international law are susceptible of reference to one or both of two ultimate sources:

(*a.*) Those deduced from relations based upon ethical or

[1] Justice Cockburn, in R. *vs.* Keyn; Stephens, "History of the Criminal Law," vol. ii. p. 41. "In the actual erection of the complete structure of international law, there have been two celebrated schools which, severally, have affected to extract from different, or even from opposite sources, the rules of which the body of law is composed. The one school has rested the authority for an European law of nations upon the actual usage, and the assent implied in the fact of that usage of the states of Europe. The other school has not felt itself bound by the limitations implied in actual usage or assent, but has conceived itself entitled to make the European law of nations repose on the authority of an antecedent 'law of nature.' This law of nature is here intended to imply a body of prescriptions of universal and necessary validity, the exact terms of them being discoverable on the application of certain wide and general maxims of justice, truth, mercy and humanity, to the particular circumstances of the case for which the rule is demanded." Amos, Science of Law, p. 337; see also note 3, p. 26.

[2] For an extended discussion of this subject, see Amos, Political and Legal Remedies for War; Lorimer, Institutes, pp. 87-90; and Mackintosh, Collected Works, p. 430; Creasy, First Platform, pp. 362, 363; I Lorimer, pp. 87–90.

moral principles. To this class belong good faith, humanity, and comity, the faithful observance of treaties and agreements.

(*b*.) Those deduced from usage, agreement or precedent, and so based upon the consent of nations; hence international law may be divided into:

(1.) **The Natural Law of Nations.** As men living together in communities are guided in their actions and relations by well-known moral laws, so nations, which are but societies, or aggregates, of men, and the individuals who control and represent them, are guided in their actions by the same moral rules. From this body of ethical principles, governing alike individuals and nations, is deduced the *natural law of nations*.[1]

The code of Christian ethics contained in the New Testament serves at once as a rule of conduct in international relations, and as a standard by which that conduct can be judged, and its inherent rightfulness or wrongfulness determined.[2]

(2.) **The Positive Law of Nations.** It has been seen that the rules which regulate sovereign states in their intercourse with each other, not being imposed by a common superior, are not *laws* in the sense in which that term is used in municipal jurisprudence. It has also been seen that some of the rules of international law are deduced from customs which are themselves derived from usages and precedents that have been sanctioned by long continued observance; others are based upon formal agreements, or contracts, called treaties, or conventions, to which, in some cases, most states of the civilized world have been parties. This body of rules is sometimes called the *Positive Law of Nations*,[3] and has been classified, having regard to its sources, into:

[1] Wheaton, Int. Law, § 9; Vattel, prelim. chap. § 7; I Halleck, chap. ii. § 3; Woolsey, §§ 10–13, 26, 27; Creasy, §§ 20–48; I Phillimore, pp. 27–39.

[2] Creasy, §§ 14*a*, 15; Woolsey, §§ 10–16; I Halleck, chap. ii. §§ 2–6; I Phillimore, §§ 29–33; I Twiss, §§ 82–87.

[3] I Stephens, History of the Criminal Law of England, pp. 33, 34; I Halleck, chap. ii. §§ 5, 6; Woolsey, §§ 26, 27; I Pradier-Fodéré, §§ 13–20; Vattel, prelim. chap. § 27; Creasy, §§ 65–79; Holtzendorff, §§ 6, 7; I Ferguson, § 19; I Twiss, §§ 82–85.

(*a.*) **The Customary Law of Nations,** including those rules which are deduced from usage and precedent.[1]

(*b.*) **The Conventional Law of Nations,** including those rules which are based upon, or deduced from, the consent of states as expressed in the treaties and conventions entered into by them.[2]

The Parties to International Law

The parties to international law are sovereign states. In the fullest acceptation of the term it prevails only among the Christian states of Europe and those originally colonized by them in America and elsewhere. This is due to the fact that these states have had a common historical development, and recognize the same, or nearly the same, standards of law and morals. The area over which it operates, however, is slowly extending. Turkey became a party to it in 1856, and it is steadily gaining recognition in China, Japan, and other Asiatic states, though its acceptance in those countries can never be so complete as in the Western nations of Europe and America.[3]

References. The origin of the science of international law and its historical development have been made the subject of treatment by many writers, both English and Continental. The earliest English work upon this subject is that of Ward, whose "Inquiry into the Foundation and History of the Law of Nations in Europe" appeared in 1795. Wheaton's "History of the Law of Nations" is the fullest and in many respects the most satisfactory work of the kind in the English language. To a certain extent Ward and Wheaton supplement each other. The legal

[1] Holtzendorff, § 25; Manning, pp. 78–85; I Halleck, chap. ii. §§ 8, 9; I Phillimore, §§ 41–45.

[2] Wheaton, Int. Law, § 9; I Halleck, chap. ii. §§ 7, 8; Vattel, prelim. chap. §§ 24, 25; Creasy, § 79; Manning, pp. 86, 87; Lawrence, § 63; I Phillimore, chaps. v. and vi. §§ 49–54; I Twiss, pp. 148–150.

[3] Lawrence, Int. Law, § 42; Woolsey, § 5; Wildman, p. 38; Klüber, §§ 1, 2; Heffter, § 1; Walker, Manual, pp. 1–7; I Twiss, §§ 1, 2; Dana's Wheaton, § 16; Hall, §§ 1, 2; Bluntschli, liv. ii. § 17; I Ferguson, § 16. For a discussion of the position of China in international law, see vol. xvii. Revue de Droit International, p. 504.

and historical works of Hallam, Freeman, Stephen, Amos, and Maine in English, and of Mommsen, Ranke, and Ihne in German, have contributed to throw much light upon the history of society and institutions, and it is impossible to understand the development of international law without some knowledge of the historical development of the states and societies of whose relations with each other international law is but the record. Most works upon the law of nations contain, in their introductory chapters, more or less full accounts of the history of the science. Among them may be mentioned those contained in Halleck, chaps. i. ii.; G. F. De Martens, §§ 1–15; Phillimore, introduction and chaps. iii.–ix.; Heffter, §§ 1–13; Hall, introduction and p. 2, note; and Laurent, "Droit de Gens," and "Études sur l'Histoire de l'Humanité," liv. ii., chaps. i.–iii.; liv. iii., chaps. i.–iv.; liv. iv., chaps. i. ii. The profound influence exerted by the Roman law upon the development of the science is now fully appreciated. For a discussion of the question, see Maine, "Ancient Law," pp. 92–108; Amos, "Science of Law," pp. 332–341; Morey, "Outlines of Roman Law," pp. 207–214; Lawrence, "Principles of International Law," chap. iii. §§ 30–41; and Westlake's "International Law," chaps. ii.–v. The principal attempts to codify the rules of international law are those undertaken by David Dudley Field in the United States, and Professor Bluntschli in Germany.[1]

General Bibliography of the Subject of International Law. For a full bibliography of the subject of international law, see G. F. De Martens, "Précis du Droit de Gens," pp. 357–441; Klüber, "Droit de Gens," pp. 419–468, and Holtzendorff, "Introduction au Droit de Gens." For a similar work in English, see Woolsey's "International Law," appendix i. pp. 413–429.

[1] See also vol. xxi. Revue de Droit International, p. 521.

CHAPTER II

STATES AND THEIR ESSENTIAL ATTRIBUTES: SOVEREIGNTY, GOVERNMENT, TERRITORY

State: Nation. A *state* is a society of persons having a permanent political organization, and exercising within a certain territory the usual functions of government.[1]

The terms *state* and *nation* are by no means synonymous. The latter involves the idea of a community of race or language, the former is applied to a society of men organized under some form of government and occupying a fixed territory. A nation may furnish a contingent of population to several states. There is a Polish population in Austria, Russia, and Prussia; a German population in Prussia and Austria; on the other hand, the Austrian, Russian, and Ottoman empires include several distinct nationalities. As applied to societies of men, the term *state* represents an artificial, the term *nation* a natural, division. In recent times the tendency to reorganize states upon a national basis has been very marked. The movements within the present century which have resulted in quite a large measure of national unity in Germany and Italy are illustrations of this tendency.[2]

Citizens: Subjects. The members of this society, or the individual units whose association forms the body politic known as the state, are called its *citizens* or *subjects;* the

[1] Creasy, pp. 93–99, 112–118; Wheaton, §§ 17, 33; Vattel, liv. i. chap. i. § 1; Maine, Int. Law, pp. 33, 54, 74; Hall, §§ 1, 2; Manning, p. 92; Pomeroy, §§ 47–56; Woolsey, § 36; Klüber, § 20; Bluntschli, §§ 17–27; I De Martens, § 16; I Phillimore, §§ 63–65; I Pradier-Fodéré, §§ 45–68; Wildman, p. 39; Lawrence, § 43; Heffter, §§ 15–18.

[2] I Halleck, chap. iii. § 2; Wheaton, § 17; Pomeroy, § 47; Bowen, § 9; I Pradier-Fodéré, §§ 45–68, 69–81; I Phillimore, §§ 61–65.

former term being used in states having republican forms of government; the latter in those in which monarchical institutions exist. The duties and privileges of citizenship are determined, as will presently be seen, in part by municipal, and in part by international law.[1]

Government. The government of a state is the outward, visible expression of its sovereignty; it is also the agency, by means of which its sovereign powers are exercised, and through which it maintains intercourse with other states of the civilized world. It speaks and acts through agents, called public officers, whose powers are exercised, in behalf of the community at large, in accordance with the requirements of its constitution and laws.[2] Through one of its departments or offices, that of State, or Foreign Affairs, its intercourse with other states is conducted.

Kinds of Government. A *constitutional government* is one in which the powers of sovereignty are defined and limited in accordance with the principles of a fundamental law called a constitution. None of the modern Christian states that acknowledge the sanctions of international law can be said to be absolutely without a constitution or fundamental law of some sort. There may be no substantial guarantees of individual right or of personal freedom; indeed, such rights may not exist, or may be restricted within very narrow limits. It may be a formal written instrument, as in the United States; it may be in great part unwritten, as is the case with the British constitution; or, as in many Continental states of Europe, it may be embodied in the municipal law, from which those principles which are of a fundamental character may be deduced and determined. In some form it must exist. Without such

[1] Vattel, liv. i. chap. xix. § 212; Pomeroy, § 171. For a discussion of the right of suffrage from the point of view of municipal or constitutional law, see Cooley, Constitutional Law, pp. 259–268; see, also, the articles on political suffrage, by M. Henri Pascard, in vol. xxiii. of the Revue de Droit International, pp. 441–474; vol. xxiv. pp. 69–99; vol. xxvi. pp. 51–75, 269–288.

[2] Vattel, liv. i. chap. i. §§ 2, 3; Klüber, §§ 30, 53; I De Martens, §§ 23–28; Hall, § 2; Heffter, § 16; I Lorimer, pp. 203–210.

a body of fundamental principles no modern government could be carried on.[1]

An *absolute government*, on the other hand, is one in which no limitations have been imposed upon the sovereign; where such limitations exist, they usually appear in some form of representative institutions, the members of which are chosen by an exercise of the right of suffrage on the part of its citizens or subjects; a government is also said to be absolute in form when the duties, privileges, and immunities of citizenship have not been made the subject of formal constitutional guarantees.[2]

Classification. Governments are also classified according to the source of sovereign power, or the manner in which it is exercised in each.[3]

A *monarchy* is a government in which the sovereign powers are concentrated in a single person. An absolute monarchy is one in which the concentration of sovereign powers is real. A limited monarchy is one in which the royal authority is restricted in its exercise, usually by representative institutions of some kind. These restrictions may be so extensive in character as to reduce the sovereign to the condition of an hereditary executive. This is the case in England.

An *aristocracy* is a government in which the sovereign powers are held to reside in a class. If the ruling class constitutes a small proportion of the population the resulting government is called an oligarchy.

A *democracy* is a government in which the sovereign powers are held to reside in all the people, and are exercised by them directly.

A *republic*, or, as it is sometimes called, a *democratic republic*, is a government in which the sovereign power resides in the people, but is exercised by representatives elected by them for that purpose.

[1] I De Martens, § 24; Klüber, §§ 30, 51, 52; I Lorimer, pp. 208–215; Creasy, §§ 102–106; Ortolan, liv. i. pp. 10–13; Heffter, § 16.

[2] I De Martens, § 25; I Lorimer, pp. 211, 212.

[3] Klüber, §§ 30–35; I De Martens, §§ 23–28; I Lorimer, pp. 203–212; Creasy, §§ 100–103; I Pradier-Fodéré, § 125.

De Facto and De Jure Governments. Governments are again classified, according to the opinion or belief of the person using the term, into governments *de facto* and *de jure*. A *de facto* government is one actually existing in a state, and for the time possessing sufficient strength to exercise sovereign powers. Thus the *de facto* government in France, in 1792, was that carried on by the National Convention. A *de jure* government is one which the person using the term believes to be the rightful government of the state; and it may or may not be in enjoyment of the power of sovereignty. Thus, in 1792, Austria regarded the government of Louis XVI. as the *de jure* government of France. From the stand-point of international law the term government is usually applied to the *de facto* government of a state, and such governments are generally recognized in fact, if not in name.[1]

SOVEREIGN STATES

THE ESSENTIAL ATTRIBUTES OF SOVEREIGNTY

Sovereign States. The term "state" has already been defined as a society of persons, organized for a particular purpose, and occupying a particular territory. Within the boundaries of that territory the power of the state may be absolutely supreme, or it may be dependent upon, or exercised in subordination to, that of some other state; in both cases the body politic is a "state" from the point of view of the law of nations, but it is only in the former case, however, that it is regarded as a sovereign state. A sovereign state may therefore be defined as one which retains and exercises in their entirety its essential attributes of sovereignty, which has parted with none of them, but retains them all unimpaired.[2] In

[1] Creasy, §§ 103–111; I Halleck, chap. iii. § 21; Wildman, p. 57. See also the title, p. 42, "Recognition of Sovereignty."

[2] I Halleck, chap. iii. § 1; Klüber, § 21; Bluntschli, § 64; I De Martens, § 23; Bowen, Int. Law, § 9; Wheaton, part i. chap. i. § 20; Vattel, liv. i. chap. i. § 4, Grotius, book i. chap. iii. § 7; Heffter,

this sense Russia, England, France, China, Japan, and the United States are sovereign states.

The Essential Attributes of a Sovereign State. From the point of view of international law, the attributes which are essential to the conception of a sovereign state are three in number—sovereignty, independence, and equality.

Sovereignty. The sovereignty of a state is its inherent right to assume and exercise jurisdiction over all questions arising within its boundaries, and to control and regulate the actions and legal relations of all persons within its territorial limits.[1] This jurisdiction — in all cases not covered by the principle or fiction of exterritoriality, presently to be explained —extends not only to those who occupy the status of citizens or subjects, but includes all persons whatsoever, whether aliens or domiciled strangers, who, by coming into the territories of the state are presumed to have submitted themselves to the operation of its laws during the period of their residence or sojourn.[2]

§§ 15–25; Pomeroy, § 51; Manning, p. 93; Westlake, chap. vii.; I Ferguson, § 24; Gallaudet, p. 62; Hall, § 1; I Pradier-Fodéré, §§ 129-136; Wildman, pp. 38, 39; Ortolan, liv. i. pp. 10, 11, 46–48.

[1] Heffter, §§ 18, 26; Bluntschli, §§ 64–68; Klüber, § 21; Woolsey, § 37; Manning, pp. 92, 93; I Halleck, chap. iii. §§ 1–9; Creasy, pp. 6, 95, 99; Pomeroy, § 51.

[2] In modern text-books the most signal and decisive attributes of a state are usually said to be "sovereignty" and "independence." A formal distinction is not commonly made between the import of these terms, though, from the way in which they are severally used, it would seem that the notion that underlies them is one of which sovereignty represents the positive, and independence the negative side. The sovereignty of a state is its inherent capacity it enjoys to select, to maintain, or to change its own form of government; to exercise plenary civil and criminal jurisdiction over its own subjects; to alienate or (subject to the claims of other states) to acquire territory; to make, with other states, a fair competitive claim to the use of common things, such as the ocean and unoccupied territory; and to uphold, by every means in its power, the integrity of its existence both against external and internal enemies. It is obvious that the sovereignty here described can only be fully exercised by any one state with the practical concurrence and co-operation of every other state. Thus the positive enjoyment and exercise of sovereignty implies, as its negative and essential correlative, independence; that is, exemption from every species of interference on the part of other states. Manning, Law of Nations (Amos ed.), pp. 92, 93.

Independence. The conception of independence is included in that of sovereignty, of which, indeed, it is the negative view. It involves an immunity from all interference from without in the purely internal affairs of a state, and implies a corresponding obligation to abstain from similar interference in the internal affairs of other states.[1]

Equality. It has been seen that a state possesses a certain number of sovereign rights and powers. These rights are possessed in precisely the same number and to the same degree by every sovereign state. This is called the equality of states. It is not to be inferred from this definition that all states are equal in dignity, importance, or power. It is only asserted that each state possesses the same number of sovereign rights and powers, and each to the same degree that they are possessed by every other state.[2] For example: England and Portugal have the same right to borrow money, to send ambassadors, and to make treaties of alliance. But whether one can borrow money at a lower rate of interest than the other, whether the ambassadors of both powers at Berlin have the same influence, and whether an alliance with one will be as advantageous as with the other, are questions that depend upon the financial resources, political influence, and military power of each state, all of which are very unequal.

[1] Creasy, §§ 95–99; Pomeroy, § 51; Manning, pp. 93–100; Westlake, chap. vii.; I Lorimer, pp. 139–154; I Twiss, §§ 106, 107; I Ferguson, § 28; I Halleck, chap. iv. § 1; Wheaton, part ii. chap. i. § 72; Klüber, §§ 22, 45–50; Bluntschli, §§ 64–67; I De Martens, § 116; Vattel, prelim. chap. § 15; Hall, §§ 8–10; I Phillimore, § 145; Creasy, §§ 95–99; I Pradier-Fodéré, §§ 287–295; Wildman, pp. 38, 39; Ortolan. liv. i. p. 51; Lawrence, Int. Law, § 70.

[2] I Halleck, chap. v. §§ 1, 2; Vattel, prelim. chap. § 18; Wheaton, part ii. chap. iii. §§ 152–160; Heffter, §§ 27, 53; Klüber, § 89; Bluntschli, §§ 81–94; I De Martens, § 125; Creasy, §§ 119–129; Pomeroy, § 51; Manning, pp. 100–102; Westlake, chap. vii.; I Ferguson, § 29; Gallaudet, p. 102; I Phillimore, § 147; I Pradier-Fodéré, §§ 442–461; Ortolan, liv. i. pp. 51, 52.

Dependent States: Confederations

Dependent States. A sovereign state has already been described; a dependent or semi-sovereign state is one which has lost or surrendered some of its essential attributes of sovereignty, or which was not endowed with perfect sovereign rights when it was constituted a state. The Ionian Islands, placed by the Treaty of Paris under the protection of Great Britain, are cited by Klüber as a perfect example of a semi-sovereign state.[1] In this sense the Samoan Islands, the Congo Free State, Egypt, and Bulgaria are dependent states.

Confederations. A confederation is an artificial state, resulting from the more or less complete union of two or more states. This involves the temporary or permanent surrender of some sovereign rights on the part of each of the confederated states which pass to, and are vested in, the artificial state created by the treaty of union, or constitution of the confederacy. The number and importance of the sovereign rights surrendered by the component states will determine the character and strength of the confederacy. If the powers surrendered be few and non-essential, the confederacy is said to be weak; if, on the other hand, the powers so surrendered be numerous and important, the resulting confederation is said to be strong—the strength or weakness of the union being determined, in every case, by the number and importance of the rights vested in the confederate government by the treaty or compact which created it. The United States under the Articles of Confederation, the Holy Roman Empire, the Zollverein, and the German Confederation, as reorganized in 1815, are examples of loose confederations. The present German Empire is a stronger confederation. The Swiss Confederation, the union of England

[1] I Phillimore, p. 100; Klüber, §§ 24–26, 33; Bluntschli, §§ 76–80; I De Martens, §§ 20–23; I Halleck, chap. iii. §§ 3–9, 17; Grotius, book i. chap. iii. § 7; Vattel, liv. i. chap. i. §§ 7–11; Wheaton, part i. chap. ii. §§ 34–39; I Phillimore, §§ 70–99; Lawrence, § 49; Westlake, pp. 86–101.

and Scotland, the United States under the present Constitution, are examples of close political union.[1]

Rule for Determining the Strength of a Confederation or Union. Between these extremes there may exist many kinds of confederacies. To determine the political strength of any particular confederation its constitution must be examined, and an accurate account taken of the powers surrendered and retained by each component state. If the power of making political treaties, of sending and receiving ambassadors, and of making war and concluding treaties of peace are vested in the central government, the confederacy is said to be strong. If a considerable number of these powers are retained by the component states the confederation is said to be weak.[2]

Protectorates. The term "protectorate" is applied to the relation established between a stronger and a weaker state, by which the weaker is protected from foreign aggression and interference, but suffers in consequence some diminution of its rights of sovereignty and independence. This relation is established by treaty, by the terms of which the extent and character of the protectorate are determined. In most protectorates the foreign relations of the protected state, including the power to engage in war, are in great part regulated by the protector. In so far as other nations are concerned, however, the relations of the interested states forming the protectorate are regarded as strictly internal in character; "the two constitute a single system, possessing and exercising all the powers which belong to civilized government, and not subject to the interference of any third state as to the distribution of those powers,"[3] which is regulated by the interested states to the exclusion of all others. The republic of San

[1] Wheaton, part i. chap. ii. §§ 39–59; I Halleck, chap. iii. §§ 10–17; Klüber, §§ 27, 28; Bluntschli, §§ 70–73; I De Martens, §§ 20, 29; I Phillimore, §§ 100–123; Creasy, §§ 140–146; Ortolan, liv. i. pp. 13–38; Lawrence, §§ 45–51.

[2] Lawrence, § 45; Woolsey, § 108; Pomeroy, § 62; Dana's Wheaton, §§ 44–59; I Lorimer, pp. 182–215.

[3] Westlake, p. 178; Ibid. 87–89; Lawrence, §§ 102–104; I De Martens, § 16; Hall, § 38, p. 127; I Ortolan, pp. 38–45; I Halleck, chap. iii. § 9; Heffter, § 22, par. iv.

Marino in Italy, and the relation existing between France and Tunis and England and Zanzibar are examples of protectorates in the modern sense of the term.[1]

SOVEREIGN POWERS

NATURE AND CLASSIFICATION

Extent of Sovereignty. From the definition of a sovereign state it follows that "the jurisdiction of a nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from any external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.[2] This jurisdiction extends to all subjects and over all persons within its territorial limits, it matters not whether those persons be native-born, or naturalized citizens, or aliens. It involves the right of maintaining any form of government, of administering that government in accordance with its own views and methods, and of changing its form whenever such a change seems necessary or desirable. It implies the right of classifying the sovereign powers, and of distributing them among several departments, or of concentrating all of them in the hands of a single ruler or sovereign. It involves an immunity from interference, from external sources, in the enjoyment and exercise of its sovereign powers, and a corresponding obligation to abstain from similar interference in the internal affairs of other states.[3]

[1] Westlake, pp. 177–187; Walker, Manual, pp. 15, 16, 31; Hall, § 38*, p. 129, note; Risley, p. 39. For the meaning of the term "spheres of influence," see the article so entitled in chap. iii., "Perfect and Imperfect Rights."

[2] Case of the *Exchange*, 7 Cranch, 116; Wheaton, part i. chap. ii. §§ 20, 21; Vattel, liv. i. chap. iii. §§ 31–37; I Halleck, chap. iv. §§ 1–3, chap. vii.; I Twiss, §§ 157–159; Pomeroy, §§ 166–173.

[3] Manning, Law of Nations, pp. 92, 93. According to the pure spirit of the law of nations, no nation gives herself a claim to call upon other nations for a strict ob-

Classification of Sovereign Powers. The right of sovereignty is inherent in the artificial body politic which we call the state. It is exercised, like other sovereign powers, through the government of the state, and the various rights of jurisdiction are usually classified and distributed among the different departments of government. The jurisdictional powers of a state are usually divided into:

(*a.*) *The Legislative Department.* In this department is vested the power to make, alter, and repeal laws. In states which recognize the people as the ultimate source of sovereignty, this department stands first in power and importance. It expresses, more directly than any other, the sovereign will upon any question coming within its jurisdiction. It determines the policy of the state upon all matters internal and external, and can change that policy at will. At the other extreme lie states in which the sovereign authority is held to reside in the person of a single ruler or sovereign. Here the legislative department does not exist, and the powers usually exercised by it are vested in the hands of the sovereign or executive.

(*b.*) *The Executive Department.* In this department is vested the power to execute the laws and to represent the state in its intercourse with foreign powers. In states which recognize the principle of popular sovereignty the executive himself represents the people in the exercise of that class of governmental powers which has to do with carrying the laws into effect. He is responsible to them for the manner in which he performs his duty; and, either directly or through his subordinates, represents them in all intercourse with foreign powers. In the exercise of the powers which are peculiar to his office

servance of their law who does not observe it strictly upon her own part, not only in the particular class of cases in which she makes the call, but throughout the whole system of that law; for that law presents an entire system of the relative rights and duties of nations, founded throughout on the purest morality and the most expanded philanthropy, and every part of it is equally obligatory on all nations. — Sullivan's case, I Opinions of Attorney-General, 509 [511], Wirt (1821).

he is independent of the other departments of the government. He also represents in the highest degree the dignity and majesty of the state; an insult to him is an insult to the state, and attacks directed against his person or authority are usually given the character of treason.

(*c.*) *The Judicial Department.* In this department is vested the power to apply the laws in the decision of cases arising under them. The jurisdiction of the courts of a state is further classified into *civil* and *criminal.* The former extends to the decision of all suits or controversies in law or equity, arising between individuals out of contracts, claims, and services, as well as from torts and injuries. The latter includes the power to try and punish all offences against the state or its sovereign representative, or against society or the individuals who compose it.

Exclusive Jurisdiction, where Exercised. This right of jurisdiction is exclusive in all cases arising within the territorial limits of a state, or upon its public or private vessels on the high seas. It is of the most comprehensive character, and, within the territorial limits as above described, no offence can be committed, no act be done, no occasion arise for governmental interference of any kind that will not fall within the jurisdiction of some branch or department of the government of the state, or over which that jurisdiction will not be final and exclusive.[1]

Acquisition and Loss of Sovereignty. Of the states now acknowledged as sovereign, in the civilized world, some were in existence when international law began to assume importance as a separate science; others have since been added to the family of states. A new state may come into being in one of two ways.

[1] The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.—Schooner *Exchange vs.* McFadden, 7 Cranch, 116 [136].

(*a.*) By separation from an existing state or states; and this may be brought about: (1) By peaceful methods, with the consent of the parent state, or with the mutual consent of the states from which the new state derives its territory and population; (2) By violent or hostile means, as by revolution or conquest.

(*b.*) By the combination of two or more states into a permanent union, the component states abandoning their identity completely, or surrendering permanently most of their sovereign powers.[1]

A state may lose a part or the whole of its sovereign character. It may lose its identity completely, by absorption in another state; by peaceful methods of confederation or union, or by the hostile methods of conquest or subjugation. Sovereign rights and obligations, however, can never be destroyed. If they cease to be exercised by one state they pass with the population and territory into the corporate existence of another, which assumes them, and, while enjoying the rights, must recognize and be bound by the obligations.[2]

Recognition of Sovereignty. When a new state comes into being, in accordance with any one of the methods above indicated, it becomes an acknowledged member of the family of nations as a consequence of its independence being recognized by states already in existence. The question of according such recognition—both as to time and method—is a matter which each state decides for itself; in some cases it is promptly accorded, in others it is delayed, either indefinitely, or until certain conditions have been fulfilled. Sooner or later, however, the independence of a state, being a question of fact, its separate and independent existence must be recognized, as a matter of fact, by the states of the civilized world.[3]

[1] I Halleck, chap. iii. § 18; Wheaton, part i. chap. ii. § 21; Hall, § 26; I Phillimore, § 62; Creasy, §§ 147–153; I Pradier-Fodéré, § 128; Ortolan, liv. i. p. 11; Revue de Droit International, vol. xx. p. 303; Klüber, § 23; Lawrence, §§ 56–60.

[2] I Halleck, chap. iii. § 23; Wheaton, part i. chap. ii. §§ 22–27; Grotius, book ii. chap. ix. § 6; I Phillimore, §§ 124, 125; Creasy, §§ 151, 152; I Pradier-Fodéré, §§ 146–148; Ortolan, liv. i. pp. 11, 12.

[3] I Halleck, chap. iii. § 22; Hall, § 26; Wheaton, part i. chap. ii. §§ 26, 27; Creasy, §§ 637–643; I Lorimer, book ii. pp. 93–152; I Ferguson,

Right of a State to Change its Constitution and Form of Government. As an incident of its sovereignty and independence, a state has a perfect right to make such changes in its constitution, government, and laws as it may deem expedient or desirable; and these changes may be so radical in character as to effect a complete change in its form of government. The position of such a state in international law is in no way affected by such changes, so long as they are strictly internal in character. The new government succeeds to the powers and privileges, and becomes responsible for the obligations, of the government which has been displaced; none of which are abrogated, or in any way impaired in consequence of such purely internal changes. This follows from the principle that a state is a continuing body, capable of acquiring and enjoying rights, of exercising sovereign powers, of incurring obligations, and of performing duties. Of this body politic the government is the agent or representative, and a change of government is, therefore, but a change in the character of this agency; it gives the state no new powers or rights, and it absolves it from none of its duties or obligations. These ever remain unchanged.[1]

chap. v. § 24; I Pradier-Fodéré, §§ 136–145. The United States observe as their rule of public law to recognize governments *de facto* and also governing persons *de facto*, without scrutiny of the question of legitimacy of origin or succession.—VII Opinions of Attorney-General, 582. When a question arises with reference to the existence or validity of an organization claiming to be the lawful government of a foreign country, the courts are bound by the decision of the executive power; such a question is political and not judicial. The steamer *Hornet* having been seized upon a charge of violation of neutrality, a person claiming to be the agent of the "republic of Cuba" having applied to intervene: Held, that the question being a political one, and the republic of Cuba not having been publicly recognized, such claim could not be allowed.—The *Hornet*, 2 Abbott, 35. See also I Dig. Int. Law, § 70.

[1] Klüber, §§ 51, 52; Bluntschli, §§ 39–45; I De Martens, §§ 74–78; I Halleck, chap. iii. §§ 19–28; chap. iv. § 2; Wheaton, part ii. chap. i. § 72; Vattel, liv. i. chap. iii. §§ 31–35; Grotius, book ii. chap. ix. § 8; I Kent, Com., pp. 25, 26; Hall, § 2; Creasy, §§ 104–153; Pomeroy, §§ 67–75; I Lorimer, book ii. chap. xii.; I Phillimore, §§ 126–137, 148, 149; I Pradier-Fodéré, §§ 149–163; Wildman, p. 68; II Dig. Int. Law, §§ 137, 236, 248.

TERRITORY: BOUNDARIES

Territory. It has already been seen that a state must exercise its sovereign powers within certain fixed and defined territorial limits; within those limits, as a consequence of its sovereignty and independence, its authority and jurisdiction are supreme, not only over all questions that can arise demanding governmental interference, but as to the acts of all persons whether citizens or aliens. Beyond its territorial limits, however, such jurisdiction ceases and that of another sovereign state comes into operation and becomes paramount. It is thus seen that sovereignty and territory are conterminous, and that the only possible line of demarcation that can effectually separate sovereign states is a territorial boundary. Where the sovereignty of one state begins that of another ends.[1] The territory of a state may therefore be defined as that portion of the earth's surface which is included within its boundaries, over which it exercises jurisdiction, and within which that jurisdiction is supreme.

Boundaries. The boundaries of a state may be natural, consisting of oceans, seas, gulfs, lakes, or bays; or they may be artificial, consisting of parallels of latitude, or meridians of longitude, or imaginary lines described in treaties by their direction and length between terminal points. They are usually established by accurate surveys and marked in position by permanent monuments.[2]

What Constitutes the Territory of a State. All the land and all bodies of water, all inland seas, gulfs, lakes, rivers, and bays lying entirely within the external boundaries of the state,

[1] Walker, Manual, 8; Lawrence, Int. Law, §§ 90–91; Klüber, § 128; Walker, Science of Int. Law, p. 43. The United States Government cannot purchase a grant of land in, or concession of a right of way over, the territories of another nation as could an individual or private corporation, since, by the law of nations, one government cannot enter upon the territories of another or claim any right whatever therein.—The Chiriqui Improvement Company, IX Opinions of Attorney-General, p. 286, Black (1859).

[2] Heffter, § 66; I De Martens, §§ 38. 39. 72; Klüber, § 133; Hall, § 38; I Dig. Int. Law, § 22.

are portions of its territory, and, as such, subject to its exclusive jurisdiction. All littoral islands belong to the state to which they are adjacent; all gulfs and bays, river mouths and estuaries included, or almost included, by the land, are also regarded as a part of the territory of a state. If the headlands be remote, the rule of possession is not yet fully determined, for the reason that no international understanding has as yet been reached as to the distance between headlands which shall determine ownership and jurisdiction in all cases. As claims are advanced to jurisdiction over particular bodies of water, they are usually adjusted by the states locally interested, and their decision, if just and equitable, is acquiesced in by other nations.[1]

In some instances the changes are so numerous and important as to have made it necessary for the interested states to make provision for the constant observation and supervision of boundary rivers by means of permanent commissions. This is the case in respect to the Rio Grande, which forms a portion of the boundary between the United States and Mexico.[2]

[1] Lawrence, Int. Law, § 91; Heffter, § 65; Klüber, § 129; I De Martens, § 72; I Halleck, pp. 134–145; Revue de Droit International, vol. xxvi. pp. 209–214; Hall, §§ 30–33.

[2] The treaty of November 12, 1884, between the United States and Mexico, declares that the boundary line of the Rio Grande shall "follow the centre of the normal channel, notwithstanding any alterations in the banks or course of the river, provided that such alterations be effected by natural causes, through the slow and gradual erosion and deposit of alluvium, and not by the abandonment of an existing river-bed and the opening of a new one." The treaty provides that any other changes, whether wrought by the current in cutting a new bed, or due to artificial changes in the navigable course of the river, in consequence of the construction of bridges, jetties, piers, or other obstructions, or by the dredging of channels, shall not be permitted to alter or affect the dividing line as established by the boundary commission in 1852; but the protection of the banks on either side from erosion by revetments of stone, or other material not projecting into the current of the river, shall not be deemed an artificial change. Provision is also made in article iv. of the treaty for determining the boundary line upon any bridge that has been or may be built across the said river; such boundary being established at a point "exactly over the middle of the main channel." The boundary so established is to remain fixed, notwithstanding any subsequent changes in the channel which may thereafter supervene.—Treaties and Conventions of the United States, 1776–1887, p. 721. It is a sound principle of national law,

Navigable Rivers. Where navigable rivers not only separate but also traverse the territory of several states, the question of boundary is necessarily affected by considerations of greater intricacy and difficulty having to do with their improvement and navigation.[1] In recent times the tendency has been to remove all restrictions upon the navigation of such rivers, and to throw them open to general commerce. These changes have been effected by treaties, to which the states interested in the navigation of particular rivers have been parties. In accordance with their stipulations uniform rates of toll have been established, unnecessary and burdensome charges have been abolished or modified, and the expenses of maintenance and improvement have been equitably assessed upon the riparian powers. To defray these expenses various expedients have been resorted to. In some of the earlier treaties the revenues derived from tolls were appropriated to the purpose. Later treaties provide for an apportionment of the expense of improvement among the riparian powers, and for the removal of *all* restrictions in the way of tolls and dues from the navigation of the river. In this way most of the navigable rivers of Europe, that are not entirely included within the territory of a single state, have been thrown open to general commercial use.[2]

Rivers as Boundaries. Where a river forms the boundary between two states, the line of demarcation follows the mid-channel. If the channel changes, there is some difference of opinion as to whether the boundary changes with it, or re-

and applies to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty.—Lattimer *vs.* Poteet, XIV Peters, p. 14; Heffter, § 66; I De Martens, §§ 38, 39; Hall, §§ 37, 38. For a discussion of the neutrality of boundary rivers, see Revue de Droit International, vol. xviii. pp. 96–159; see also Ibid. xix. p. 253.

[1] In this respect an important difference was made in the Roman law between rivers and the sea. The former were regarded as a portion of the *public* property of the state; the navigation of the latter was held to be the *common* right of all.—I Phillimore, p. 189.

[2] For a fuller discussion of this subject, see the article entitled River Navigation, p. 48; see also I De Martens, § 39.

mains in the ancient bed. In most cases that have arisen the rules of the Roman law—in this matter the simple embodiment of long experience—have prevailed in the settlement of disputed questions of boundary. Those rules assume the mid-channel of the river as the normal line of division. The experience of ages, however, proves that rivers are subject to constant modification, in respect to their course and direction, due to changes in the volume of their waters, the rapidity and strength of their currents, and the resisting power of the soil or material of which their banks are composed. These changes are attributable to two general causes; one, gradual, due to the constant erosive action of the current, by which soil is being constantly taken from one bank and deposited on the other; the other, casual or occasional, due to the sudden and violent action of the river, during a period of unusual high water, in which the current cuts new channels for itself at various points of its course. The rule in such cases is based upon the possibility of identifying the soil which has changed from one bank to the other. Soil lost by gradual erosion, not being capable of subsequent identification, becomes the property of the state upon whose territory it has been deposited; where the change in the channel has been due to the sudden action of the current, however, the land, being still possible of identification, is held to belong to its original owner, and the boundary line remains in the ancient bed.[1]

[1] When a great river is the boundary between two nations or states, if the original property is in neither and there be no convention respecting it, each holds to the middle of the stream. But where a state which is the original proprietor grants the territory on one side only, it retains the river within its own domains, and the newly erected state extends to the river only. In such case the lower-water mark is its boundary, whether the fluctuations in the stream result from tides or from an annual rise and fall.—Handly *vs.* Anthony, V Wheaton, p. 374; Heffter, § 66. When a river is the line of *arcifinious* boundary between two nations, by a treaty, its natural channel so continues, notwithstanding any changes of its course by accretion or decretion of either bank; but if the course be changed abruptly into a new bed by irruption or avulsion, then the river-bed becomes the boundary.—VIII Opinions of Attorney-General, p. 175. In a controversy between the United States and a foreign sovereign as to boundary this court must follow the decision of that department of the

The Navigation of Boundary Rivers

How Regulated. The liberal methods, now so generally applied in the solution of questions having to do with the treatment of boundary rivers, date from the Congress and treaty of Vienna in 1815. On the few previous occasions in which such questions had been made the subject of treaty stipulation, the right of public navigation, if recognized at all, had been hampered with needless and burdensome restrictions, originating in the mutual jealousies of the interested parties, and but little calculated to favor the development of commerce or to promote interstate intercourse. The treaty of Vienna, however, inaugurated a marked change in this regard. The sixteenth annexe of that instrument contains a body of fundamental principles, in accordance with which detailed rules were prepared by the states locally interested, for the regulation of navigation of six important European rivers—the Rhine, Main, Moselle, Neckar, Meuse, and Scheldt. The 109th article declares that these streams are thrown open to the commerce of all nations, from the points where they become navigable to the sea. At different times between 1815 and 1856 arrangements, conceived in the same liberal spirit, were entered into with reference to the Elbe, Vistula, Weser, and Po; and in 1835, by a treaty between Spain and Portugal, the navigation of the Douro was declared common to the subjects of both powers.[1]

Case of the Danube. As Turkey was not a party to international law at the time of the negotiation of the treaty of Vienna, the provisions of that instrument were not extended

government which is intrusted by the Constitution with the care of its foreign relations, especially if sanctioned by the legislative power.—Foster *vs.* Neilson, II Peters, p. 253. Grotius, book vii. chap. iii; Vattel, liv. i. chap. xxii.; I De Martens, § 45; I Halleck, p. 146; Klüber, § 134; Bluntschli, §§ 298–300; I Dig. Int. Law, § 30; Revue de Droit International, vol. xi. p. 363; vol. xiii. p. 187; vol. xiv. p. 122; vol. xv. p. 5; Ibid. pp. 340, 437, 547; vol. xvi. pp. 360, 551; vol. xviii. p. 159.

[1] I Halleck, pp. 147–151; I Phillimore, pp. 195–199; Lawrence, Int. Law, § 112; Hall, p. 130; I Twiss, §§ 149–152; Revue de Droit International, vol. xviii. p. 96; Ibid. vol. xix. p. 253; Bluntschli, §§ 313–316.

to the Danube. The first attempt to regulate the navigation of that river is found in the treaty of Bucharest, entered into between Turkey and Russia in 1812. By the fourth article of that treaty it was agreed that the boundary line between the two states should follow the left bank of the Danube from its junction with the Pruth to its mouth at Kilia, on the Black Sea; and the navigation of both rivers was declared to be free to the subjects of the signatory powers. The Danube enters the Black Sea through three principal channels. The most northern of these, which is known as the Kilian mouth, carries by far the greater part of its waters to the sea, and is the one best adapted to purposes of navigation. The central, or Sulina channel, discharges but a small part of the volume of the stream. The southern, or St. George's channel, carrying about one-third of the volume of the river, reaches the sea, through several mouths, at a point about twenty English miles to the south of the Sulina channel. By the Treaty of Adrianople, in 1815, to which Turkey and Russia were the contracting parties, the Sulina mouth, which had been left in the possession of Turkey by the former treaty, was acquired by Russia, that power binding itself to maintain its channel at a sufficient depth to admit vessels at all times. This stipulation does not seem to have been rigidly observed by Russia, and its failure to maintain a navigable channel was made the subject of remonstrance, at different times, by several European powers. No change was made in the existing treaties, however, and the question remained in this condition until the close of the Crimean War.

By the treaty of Paris, in 1856, to which instrument Turkey was a signatory party, the Danube was placed upon the same footing as the other great rivers of Europe. A commission was created for the purpose of erecting and maintaining such engineering works at the mouth of the river as were, or might become, necessary in the interest of navigation. The commission began its labors in 1857. The Sulina mouth was chosen as the one most susceptible of improvement, and suitable works were undertaken for its betterment. The funds for

this purpose were supplied by Turkey during the years between 1857 and 1860; from 1860 onward they were obtained by a tax levied upon all vessels entering the river. The treaty of March 13, 1871, extended the operations of the Danubian Commission for a further period of twelve years; and a new and significant step was taken by an agreement of the powers to a declaration guaranteeing the permanent neutrality of the works of improvement at the mouth of the river.[1]

The cases of the Mississippi and St. Lawrence rivers, in the United States, gave rise to much controversial discussion.

Case of the Mississippi. The peace of Paris, in 1763, brought to a close the long series of wars for dominion between England and France, to which Spain had become a party, as an ally of France, in 1761. By the treaty of Paris the Mississippi River had been recognized as the boundary between the possessions of England and France in America, from its source to its junction with the Iberville, an eastern tributary, connecting it with the lake system of its lower basin. From that point the boundary line followed the course of the Iberville, through lakes Pontchartrain and Maurepas, to the Gulf of Mexico. The line of the Iberville separated Florida and Louisiana, which were ceded by the treaty, the former to England and the latter to Spain, and the right of navigating the Mississippi was secured to the subjects of Great Britain from its source to the sea.

The treaty of peace between England and the United States, which terminated the war of the Revolution, was signed on September 3, 1783. On the same day a treaty was negotiated between England and Spain, by which the provinces of East and West Florida were retroceded to Spain; thus giving to Spain undisputed control over the lower waters of the river, from its mouth to its intersection by the thirty-first parallel of north latitude; the course of the river north of that point forming the boundary between the United States and the French possessions in North America. This state of affairs

[1] I Phillimore, pp. 198, 199; Foreign Relations of United States, 1878, pp. 855–894; I Twiss, §§ 151, 152; Lawrence, Int. Law, § 112.

gave rise to a controversy between Spain and the United States, as to the right of citizens of the latter power to navigate that part of the river lying wholly within Spanish territory.

On the part of the United States it was claimed that the treaty of 1763, between England and Spain, had given to the subjects of Great Britain the right to navigate the river from its source to the sea. This treaty had, in fact, created a territorial servitude,[1] which had not been extinguished or repudiated by either of the treaties of 1763 or 1783. It was fair to presume, therefore, that it still existed, and that the subsequent transfer of territory on the east bank of the river had been made subject to the right of navigation which was then enjoyed by the inhabitants of its upper waters. A provision of the Roman law was cited in behalf of the United States, by which all navigable rivers were held to be "so far public property that a free passage over them was open to everybody, and the use of their banks for the anchorage of vessels, lading and unlading cargo, and acts of the like kind, was regarded as incapable of restriction by any right of private domain."[2] It was also claimed, on the part of the United States, that the Mississippi River furnished the only practicable outlet to the sea for all the products of the upper valley. The claim, based upon this fact, was held by the American negotiators to be of sufficient importance to constitute a perfect right at international law. These claims were rejected by Spain, whose right to control the navigation of the lower courses of the river was based upon the fact of its territorial jurisdiction. The position assumed by the United States was not regarded as a sound one in accordance with the provisions of international law as then understood, and the controversy was brought to an end by the treaty of October 20, 1795, between the United States and Spain. By the terms of that treaty the navigation of the Mississippi was to be free to both parties throughout its entire

[1] For a description of servitudes, see p. 68.

[2] I Phillimore, p. 189, § 155; Institutes, lib. ii. tit. i. §§ 1–5; Digest, lib. i. tit. viii. § 5.

extent. The Americans were to enjoy a right of deposit at New Orleans for three years, at the end of which period either that privilege was to be continued, or an equivalent establishment was to be assigned them at some other convenient point on the banks of the Lower Mississippi.[1] The question of navigating this important stream was finally settled by the purchase of Louisiana, in 1803, and of Florida in 1819, which placed the river for its entire length within the territorial jurisdiction of the United States.

Case of the St. Lawrence.—The case of the St. Lawrence presents many considerations similar in character to those discussed in the case of the Mississippi. Its navigation was a matter of great importance to the United States for the reason that it furnished, at that time, the only outlet to the sea for commerce originating in the great lake system of North America. These lakes, with the exception of Lake Michigan, which lies wholly within the territory of the United States, lie upon, and form a part of, the boundary between the United States and the British possessions in North America. From the head of Lake Superior to the source of the St. Lawrence in Lake Ontario, and along the course of that river to its intersection by the northern boundary of the United States, the right of navigation was determined, beyond question, by the universally accepted rules of international law, and belonged jointly to the two powers. The lower course of the river, from its intersection by the forty-fifth parallel of north latitude to its mouth in the Gulf of St. Lawrence, lay entirely within the British territory. The question between the two governments, therefore, had exclusively to do with the right of navigation of the British, or lower, section of the river.

On the part of the United States it was contended, as in the case of the Mississippi, that, as the lower course of the river formed the only outlet for commerce arising in a large portion of the territory of the United States which lay upon the upper lakes, its navigation became a perfect right at inter-

[1] Hildreth, History of the United States, vol. iv. p. 569; Treaties and Conventions of the United States, 1789–1887, pp. 1007, 1017.

national law, and could be claimed, as a matter of necessity, by the state whose territory lay upon its upper waters. The right of navigating the Mississippi, stipulated for by England in a precisely similar case, was cited by the United States Government in support of its view, as was the action of the Congress of Vienna, to which England had been a party, in throwing open a number of European rivers to general navigation in cases similar to those of the St. Lawrence and Mississippi. It was also contended, in behalf of the United States, that, on account of the character and importance of the bodies of water connected by it, the St. Lawrence should be regarded as a strait rather than as a river, and that the question of its navigation should be determined, as in the case of straits, rather by the right to navigate the bodies of water connected by it than by the ownership of the banks along its lower course.

On the part of Great Britain the validity of the first of the positions assumed by the United States was denied, as not warranted by international law. The contention was also made that, wherever such concessions had been granted, they had been based upon treaty stipulations. The liberal arrangements in regard to the joint or general right of river navigation made by the Congress of Vienna, and recognized in subsequent treaties, were based upon the *conventional* law of nations, and could be withdrawn or modified at any time. To the second claim, that the river should be regarded as a strait, it was replied that the application of such a rule must be general and international, and not local and particular. If it applied to the case of the St. Lawrence, it applied with equal force to the Hudson and Mississippi, and to the artificial channels in New York and Ohio which formed a part of the line of water communication between the great lakes and the sea. Unless, therefore, the United States was prepared to open these artificial channels to general navigation, the British Government must decline to so regard that portion of the St. Lawrence which lay entirely within its territorial jurisdiction. The discussion, though ably conducted on both sides, led to no

results of immediate or practical importance. The question of navigation was settled by the reciprocity treaty of 1854; by which, in consideration of certain concessions to British subjects in the matter of navigating Lake Michigan, the right of navigation of the St. Lawrence and the Canadian canals, forming a part of the system of communication between the great lakes and the sea, was conceded to citizens of the United States.[1]

In this connection it is well to observe that the concessions thus far obtained in the matter of throwing open rivers to general navigation, however liberal they may have been, are all of them based upon treaty stipulations. In none of these treaties is the question treated as one amending or modifying the existing rules of international law upon the subject of river navigation. Such boundary rivers, therefore, as have not thus far been made the subject of treaty stipulation, are subject, in all questions affecting their ownership and navigation, to the rules of international law as they existed in 1815. No claim can be advanced to their navigation based upon the treaties above referred to, as none of them have changed or amended the existing rules of international law.[2]

THE MARINE LEAGUE: THE THREE-MILE LIMIT

Jurisdiction over a Portion of Coast Sea. Although the strict territorial jurisdiction of a state ends at the low-water mark, where the high seas begin, its claim to exercise jurisdic-

[1] Many of the navigable rivers of South America have been thrown open to general navigation (I Phillimore, p. 209; Lawrence's Wheaton, pp. 362–365). For a full discussion of the controversy between England and the United States on the subject of the St. Lawrence, see I Phillimore, pp. 204–209; Boyd's Wheaton, pp. 266–270; Lawrence's Wheaton, pp. 356–362; I Halleck pp. 150–152; Dana's Wheaton, §§ 203–205, note 119. See also I Dig. Int. Law, §§ 30, 72; III Ibid. § 302; I Phillimore, pp. 33, 203; Hall, § 39; Woolsey, p. 62; Lawrence, Int. Law, § 112; I Twiss, §§ 145–156; I De Martens, § 39; Dana's Wheaton, §§ 200–203.

[2] La Liberté de la Navigation Fluviale, Édouard Engelhardt, Revue de Droit International (1872), vol. xi. p. 363.

tion over a strip or belt of the adjacent sea, three miles in width, has long been generally recognized. Over this belt of coast sea, called the *marine league*, a state is acknowledged to have complete jurisdiction as against other states; whether its courts can assume jurisdiction over it or not will depend upon its municipal laws. This peculiar jurisdiction is acknowledged to guarantee immunity from acts of belligerency between ships of nations other than that to which the coast sea belongs; to enable a state to carry into effect its maritime laws and customs regulations; to secure protection to the inhabitants of the coast—especially to those engaged in coast fisheries, and to provide for an adequate system of coast defence. As one of the chief reasons for recognizing jurisdiction over the three-mile limit has to do with questions of sea-coast defence, it seems proper that the width of this zone should increase as the range of modern artillery increases.[1] A ship entering or passing through this strip of coast sea, in the prosecution of a voyage, is not regarded as having entered the territory of the adjacent state; nor is it subject to the rules of navigation which are sanctioned by that state and enforced against its own shipping.

The municipal laws of many states also assume a limited jurisdiction over a wider zone of coast sea in defining offences against their revenue laws. This right has never been generally recognized, however, and is only assumed or authorized[2] for fiscal and defensive purposes.[3]

[1] Ortolan, in his Diplomatie de la Mer, liv. ii. chap. viii., and Halleck, chap. vi. § 13, advocate this view. For an opposite opinion, see Boyd's Wheaton, p. 239. See also Dana's Wheaton, §§ 189, 432; Hall, § 41; I Phillimore, pp. 235–242; Lawrence, Int. Law, § 107; I Ortolan, pp. 152–162; Bluntschli, §§ 302–303; Klüber, §§ 130–131; I De Martens, §§ 40, 41; I Hautefeuille, pp. 89–92; Heffter, §§ 74–76; I Dig. Int. Law, §§ 26, 30, 32.

[2] I Halleck, pp. 135, 138; Pomeroy, § 150; Bluntschli, § 303; Heffter, §§ 75–76; I Hautefeuille, pp. 89–92; I Phillimore, pp. 235–237; Lawrence, Int. Law, § 107; I Twiss, § 190.

[3] The government of Spain has, from time to time, asserted a claim to jurisdiction over the sea within two leagues (six nautical miles) of its coast. The claim is based upon a royal cedula of December 17, 1774, which was supported by a royal decree of May 1, 1775, and by article xv. of the royal decree of May

Case of the "Franconia." Considerable light has been thrown upon the exact character and extent of the jurisdiction of a state over the sea included within the three-mile limit by the case of the *Franconia*.[1] The *Franconia* was a German steamer, commanded by Keyn, a foreigner, which, in the prosecution of a foreign voyage, passed within three miles of the English coast. While within the three-mile limit the *Franconia* collided with an English vessel and sunk her, causing the death of one of her passengers. Some time later Captain Keyn came within English jurisdiction, and was arrested and tried for manslaughter. He was convicted of that offence in the Central Criminal Court, but his case was carried up, on a question of jurisdiction, to the Court of Crown Cases Reserved. It was there held by a majority of the judges that, in so far as the court that had tried Keyn was concerned, the crime had been committed upon a foreign ship, on the high seas, and in the prosecution of a foreign voyage. The Central Criminal Court, therefore, had no jurisdiction in the case. The view of the majority was, that in so far as other states were concerned, England had jurisdiction, for all purposes, over that portion of the high seas included within the three-mile limit; but, as the law of England stood at that time, jurisdiction over crimes committed within that limit had not been conferred by Parliament upon any of the courts of the kingdom. Their criminal jurisdiction ended at the low-water mark, and crimes beyond that limit were therefore committed out of their jurisdiction.[2]

3, 1850. The claim was last asserted on August 4, 1874, by the Spanish Minister in London, in a communication to the Secretary for Foreign Affairs; to which reply was made by the British Government that it had strenuously and uniformly resisted the pretension of the Spanish Government to an exercise of jurisdiction beyond the distance of a marine league from the coast of Spain. With a view to ascertain the views of other governments, the matter was submitted to them by Great Britain in an identical communication dated September 25, 1874.—Foreign Relations of the United States, 1875, p. 641.

[1] Regina *vs.* Keyn, L. R. 2 Exch. Div. pp. 63, 202–205.

[2] Soon after this decision was announced, Parliament, by the Territorial Waters Jurisdiction Act (40 and 41 Vic. chap. lxxiii.) assumed jurisdiction over the coast sea to the distance of a marine league, and bestowed it upon the Courts of Admiralty. This was done with

THE HIGH SEAS

Extent and Use. This term is applied to the general ocean surface of the globe. It begins at the low-water mark, where, by legal presumption, the land is held to end.[1] Upon the high seas all nations have equal rights. The privilege of sailing over them or of fishing in them, beyond the three-mile limit, belongs equally to all. No state can include them within its territory, or extend its dominion over them, or exercise exclusive jurisdiction over the whole or any part of the high seas.[2]

The doctrine of the absolute freedom of the high seas is of relatively recent growth. In former times claims were made to exclusive jurisdiction over large portions of the sea, but none of them are now maintained.

Claims to Exclusive Dominion. In the early part of the sixteenth century extravagant claims to dominion were advanced by Spain and Portugal, based upon their maritime discoveries. As these claims were of the most conflicting character, a controversy arose, which was submitted to Pope Alexander VI. for decision. He decreed that all those parts of the world which were not then in the secure possession of any Christian prince should be divided between Spain and Portugal.[3] A meridian line was established through a point one

a proviso that "no proceeding should be had in any case under the act unless with the consent of one of her Majesty's secretaries of state, and on his certificate that the institution of the proceedings is, in his opinion, necessary." This reservation was doubtless intended to prevent a conflict between the executive and judicial departments of the government in the event of a case arising under the act of such a nature as to involve considerations of an international character.

[1] In accordance with the municipal law of most states, private ownership ceases at high-water mark; the ownership of lands between high and low water, which are subject to the ebb and flow of the tide, and of lands under the sea, so far as such lands are susceptible of being made the subject of proprietorship, being vested in the state which they adjoin. Like other lands or property interests of the state, however, they may be made the subject of grants by the state to which they pertain.

[2] I Ortolan, p. 125; I Halleck, chap. vi. § 13; I Phillimore, pp. 209-213; Lawrence, Int. Law, § 105; Heffter, § 73; I De Martens, §§ 42, 43; I Twiss, §§ 172-176, 185; Dana's Wheaton, § 193; Klüber, §§ 130-132; Pomeroy, § 158; Vattel, liv. i. chap. xxiii. §§ 280-283.

[3] See p. 14.

hundred leagues west of the Azores, as a boundary between the possessions of the two powers; all the territory to the west of that line was decreed to Spain, and all to the east of the same line to Portugal. Under this authority, which seems to have had international recognition, Portugal forbade all commerce with the East Indies and the west coast of Africa; Spain, claiming the Pacific Ocean and the Caribbean Sea as Spanish territory, forbade all commerce with Mexico, the west coasts of North and South America, and the islands of the Pacific.[1]

England at one time claimed that its jurisdiction over the narrow seas ended at the coast of France and the Netherlands. This claim was resisted, especially by the Dutch, and so successfully that it was largely reduced in importance, and, at the close of the seventeenth century, finally abandoned. Russia, in 1822, laid claim to exclusive jurisdiction over that part of the Pacific Ocean lying north of the fifty-first degree of north latitude, on the ground that it possessed the shores of that sea, on both continents, beyond that limit, and so had the right to restrict commerce with the coast inhabitants. England and the United States entered vigorous protests against the right of jurisdiction thus asserted by Russia, as being contrary to the principles of international law, and the claim was formally withdrawn in 1824.[2]

Jurisdiction over Closed Seas. The question of jurisdiction over many such partly included bodies of water, sometimes called *closed seas*, has already been decided. The Chesapeake and Delaware bays are recognized as parts of the territory of the United States; Hudson Bay and the Irish Sea as British territory; the Caspian Sea belongs to Russia, Lake Michigan to the United States. The Black Sea, before Rus-

[1] See p. 14; Hall, pp. 141, 142; Heffter, §§ 73–77.

[2] I Phillimore, pp. 213–217; I Halleck, pp. 141–145; Hall, § 40. For correspondence, etc., in respect to the rules of the road at sea, see Foreign Relations of the United States, 1878, pp. 354, 355; Ibid. 1880, pp. 468–472, 521, 522; Ibid. 1894, pp. 47, 217, 260, 261; Ibid. 1895, part i. pp. 683–686. See also Lawrence, Int. Law, §§ 105–109; I Twiss, §§ 179–191; Pomeroy, §§ 144–157.

sia obtained a foothold upon it, formed part of the territories of the Ottoman Porte; it is now subject to the joint jurisdiction of Turkey and Russia. The Baltic is acknowledged to have the character of a closed sea (and to be subject to the control of the powers surrounding it), certainly to the extent of guaranteeing it against acts of belligerency when the powers within whose territory it lies are at peace.[1]

Rights of Ownership and Jurisdiction in the Case of Straits; Innocent Passage. The rights of possession and jurisdiction in the case of narrow straits depend upon the ownership of the territory separated by them. The right of navigating them depends upon the character of the bodies of water which they connect. If the connected seas are open to general commercial navigation, the right extends to, and includes, the use of the strait as a necessary means of communication.[2] This is sometimes called the right of *innocent passage*. The Strait of Gibraltar is free, because the Atlantic Ocean and Mediterranean Sea are open to the commerce of all nations. A similar rule applies to the Bosporus, the Sea of Marmora, and the Dardanelles, connecting the Black and Mediterranean seas, subject to the restrictions upon the passage of war vessels which are contained in the treaties of 1856, 1871, and 1878.

If the territory separated by the waters of a narrow strait belongs to a single state, the rights of civil and criminal jurisdiction over the separating strait are conceded to belong to the owner of the territory. The Strait of Messina, separating the island of Sicily from the Italian main-land, belongs to Italy, the Bosporus and Dardanelles to Turkey, the Great

[1] Hall, § 42; Lawrence, §§ 106–109; Dana's Wheaton, §§ 178, 179, note 105; I Halleck, pp. 139–145; I Phillimore, pp. 209–217, 235–242. For a discussion of the right of property in the Bering Sea, see the Revue de Droit International, vol. xxv. pp. 417–466 (Th. Barclay). Ibid. xxvi. pp. 386, 401 (Édouard Engelhardt). See also I Twiss, §§ 180–182; I Ortolan, p. 151.

[2] Vattel, liv. i. chap. xxiii. § 292; I Phillimore, pp. 224–227. The Strait of Magellan was neutralized and thrown open to the use of all nations in 1879.—Foreign Relations of the United States, 1879, p. 23.

and Little Belt and the Sound to Denmark. If the territory separated by the waters of the strait belongs to different states, the strait belongs in part to each power. The line of demarcation is determined as in the case of boundary rivers, and the jurisdiction of the adjacent states is separated in the same manner.[1]

The Danish Sound Dues. The peculiar claim of Denmark to jurisdiction over the strait connecting the North and Baltic seas was long a fruitful source of complaint to all commercial nations. These claims were exercised in the form of a toll or tax, called *Sound Dues*, levied upon all shipping which passed through the strait in either direction. They were based, in part, upon immemorial prescription, and in part upon the expense incurred by Denmark in the maintenance of lights and buoys in the narrow and dangerous passage.

The question of the sound dues was settled in 1857 by a treaty entered into between Denmark and the great European powers. "The right of Denmark to levy these dues was not distinctly recognized, but compensation was made to her by the payment of a capital sum, on the ground of indemnity for maintaining lights and buoys, which Denmark stipulated to maintain and levy no further duties." As the treaty of 1857 dealt with other questions, of strictly European concern, to which the United States was unwilling to become a party, a separate treaty was entered into between that power and Denmark by which, in consideration of the payment of a lump sum, the shipping of the United States was to be exempted from similar levies in the future.[2]

Fishery in the High Seas. From the principle of the freedom of the high seas it follows that the right to fish in their waters is free to all mankind, and is subject to restriction or regulation, in the case of an individual, only by the munici-

[1] I Twiss, §§ 183–189; I Ortolan, pp. 146–150; Hall, § 41; Klüber, §§ 130, 131; I De Martens, § 40; I Phillimore, pp. 218–234; Dana's Wheaton, §§ 181–190; I Dig. Int. Law, § 29.

[2] I Phillimore, pp. 216, 217; I Twiss, § 188; I Dig. Int. Law, § 29; I Ortolan, pp. 147–150.

pal law of the state of which he is a citizen. Not only are the high seas free for purposes of fishery at all times and in all places, but the rules of international law make a humane exception from capture in behalf of fishing-boats of a belligerent while engaged in their legitimate pursuit in the territorial waters of the state under whose flag they sail.[1]

Coast Fisheries. The privilege of fishery, however, within the three-mile limit, is universally recognized as a right of property which is vested in the state to whose territory the waters are adjacent, and is in all respects subject to its regulation and control.[2]

Piracy. Piracy is an offence against the law of nations, and may be defined as robbery committed upon the high seas. As pirates are regarded as the enemies of all mankind, and as the offence of piracy is committed in a place over which no state has exclusive jurisdiction, pirates may be apprehended by the public armed vessels of any nation; and persons charged with piracy may be tried, whatever their nationality, by the courts of the state to which such capturing vessel belongs.[3] The punishment of piracy is death. The definition

[1] Hall, §§ 14, 40–42; I Phillimore, pp. 211, 235; Lawrence, Int. Law, §§ 105–106; Maine, Int. Law, p. 76; Heffter, § 73; Klüber, § 132; Ortolan, tom. i. chap. vii.; Creasy, § 243.

[2] I Twiss, p. 312; II Halleck, p. 151; Azuni, tom. i. chap. iii. art. viii.; II Ferguson, § 212; Heffter, § 137; II Calvo, § 932; II Ortolan, p. 51. For an account of the controversy between England and the United States in respect to the Canadian fisheries, see Hall, § 27; Lawrence's Wheaton, pp. 323–326, note; Dana's Wheaton, §§ 268–274, notes 110, 142; Creasy, § 243. For an account of the controversy between the same powers in respect to the seal fisheries in the Bering Sea, see Lawrence, Int. Law, § 106.

[3] Dana's Wheaton, §§ 122–124, note 83; United States *vs.* Smith, 5 Wheaton, 157; I Halleck, pp. 49, 192, 396, note; Risley, p. 47. Piracy is defined by the law of nations to be a forcible depredation upon property on the high seas, without lawful authority, done *animo furandi;* that is, as defined, in this connection, in a spirit and intention of universal hostility. A pirate is said to be one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet.—United States *vs.* Baker, 5 Blatchford, pp. 11, 12. The act of 1819, § 5 (3 Stat. 513; R. S. § 5368), referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the

of piracy may be extended by a state, as to offences committed within its territorial waters, or by its citizens on the high seas, but such extensions of the definition have no international validity.

Ship Canals. Artificial ways of communication, like ship-canals, however important their construction may prove to be in its effects upon commerce, can acquire interest from the point of view of international law only when their use and control, especially in time of war, have been made the subject of treaty stipulation. Regarded simply as engineering constructions, the mere fact of their existence does not operate to diminish or modify, in any respect, the civil or criminal jurisdiction of the state within whose territory they are situated; which, indeed, can only be modified by treaty stipulations. The question of their construction and use, being a new one at international law, it is sufficient to say, at this point, that no existing rules apply to them, or can be made so to apply, by any process of construction. They are not arms of

power of Congress to define and punish that crime. Piracy is defined by the law of nations with reasonable certainty. Robbery, or forcible depredation upon the sea, *animo furandi*, is piracy by the law of nations. — United States *vs.* Smith, 5 Wheaton, 153. Pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation; for they are, in truth, the common enemies of all mankind, and, as such, are liable to the extreme rights of war. And a piratical aggression by an armed vessel sailing under the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations. But every hostile attack, in a time of peace, is not necessarily piratical. It may be by mistake, or in necessary self-defence, or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the act: or it may be without just excuse, and then it carries responsibility for damages. If it proceed further, if it be an attack from revenge and malignity, from gross abuse of power, and a settled purpose of mischief, it then assumes the character of a private, unauthorized war, and may be punished by all the penalties which the law of nations can properly administer. — The *Marianna Flora*, 11 Wheaton, 40 [41]; United States *vs.* Brig *Malek Adhel*, 2 Howard, 236. A vessel loses her national character by assuming a piratical character, and a piracy committed by a foreigner from on board such a vessel upon any other vessel whatever is punishable under § 8 of the act of 1790 (1 Stat. 113; R. S. § 5360); United States *vs.* Pirates, 5 Wheaton, p. 184. See also Foreign Relations of the United States, 1877, pp. 442–447.

the sea, or straits, or rivers; neither are they natural channels of trade or commerce over which all nations have the right of innocent passage. Their neutrality in war is the most serious question that can arise with respect to them, and this can only be secured by a guarantee of the maritime powers, or by a sufficient number of them to secure the observance of such guarantee.[1]

The Panama and Nicaragua Canals. The neutrality of the partly constructed Panama Canal is guaranteed by the United States;[2] that of the proposed Nicaragua Canal is jointly guaranteed by Great Britain and the United States in the Clayton-Bulwer treaty, which provides that "when the said canal shall have been completed they will protect it from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may be forever open and free, and the capital invested therein secure."[3]

The Suez Canal. The neutrality of the Suez Canal was provided for in a treaty entered into at Constantinople on October 29, 1888, to which Austria, Egypt, France, Germany, Great Britain, Italy, the Netherlands, Russia, Spain, and Turkey were the signatory parties. The treaty provides that the maritime canal at Suez shall be open at all times, in peace as well as in war, to commercial vessels and to ships of war of all nations, without distinction of flag.[4] The signatory parties

[1] Lawrence, Int. Law, § 110; I Ferguson, §§ 91–93; Snow, p. 29.

[2] Article xxxv. Treaty of December 12, 1846; Treaties and Conventions of the United States, 1776–1887, pp. 204, 205; II Dig. Int. Law, § 40.

[3] Article v. Treaty of April 19, 1850; Treaties and Conventions of the United States, 1776–1887, pp. 440–444; I Dig. Int. Law, § 40; III Ibid. § 287 ff. See also the article by A. S. de Bustamente, in the Revue de Droit International, vol. xxvii. pp. 112–143, 223–244. See also II Dig. Int. Law, § 150; III Ibid. § 293.

[4] Revue de Droit International, vol. xx. pp. 529–558. When Prince Metternich was consulted in 1838 in regard to the feasibility of the project, he is said to have advised Mehemet Ali, the reigning Khedive of Egypt, to secure the neutralization of the canal by a European treaty before undertaking its construction. — Ibid. p. 529; see also vol. xviii. Ibid. p. 159, and vol. xix. p. 193.

agree to place no obstructions upon the use of the canal, either in peace or war; they also agree that the canal shall not be made the subject of a hostile blockade; that military obstructions shall not be placed in the waters of the canal or those of its feeders, and that no acts of hostility shall be permitted in the canal itself or within a marine league of its terminal ports.[1]

Submarine Telegraph Cables. The question of submarine cables can perhaps be best discussed in connection with the high seas and the jurisdiction of the coasts at which they terminate. The principle of the freedom of the high seas has long been recognized at international law; if, therefore, the surface of the high seas be free, for purposes of commerce and navigation, their use beneath the surface, for any economic or commercial purpose, must, from the nature of the case, be equally free. When a cable reaches soundings, however, within the three mile limit, it passes under the exclusive jurisdiction of the state within whose territory its terminal station is located. Questions in respect to the construction and maintenance of oceanic cables, and of their protection from injury in time of peace, like their neutrality in war, can only be effectively regulated by the concerted action of the maritime powers; the former of these questions, indeed, has already been made the subject of treaty stipulation.

With a view to secure such international action, a conference of thirty-one states, convened upon the invitation of the French Government, met at Paris on October 16, 1882, and drew up a project, having for its purpose the maintenance of submarine cables and their preservation from injury. As a result of this conference, a protocol was signed by the representatives of thirty-one states, and submitted to their respective governments for consideration. In pursuance of this agreement a second conference was held at Paris, where, on March 14, 1884, a convention was entered into which was signed by the

[1] For a discussion of the neutrality of the Suez Canal, see Revue de Droit International, vol. xvii. p. 615; vol. xviii. p. 159; vol. xx. p. 529.

duly authorized representatives of twenty-five independent states. In order to give the contracting parties an opportunity for the adoption of the requisite municipal legislation, the 1st of January, 1884, was agreed upon as the date when the convention was to become operative. The ratifications of seventeen states were exchanged at Paris on April 16, 1885.

The treaty applies to such legally established submarine cables as are, or may be landed, on the territory of the signatory powers. It gives to the act of wilfully injuring or destroying such cables the character of a penal offence; confers certain rights of way and position upon vessels engaged in the construction or repair of submarine cables, and requires other ships to keep at a distance of one nautical mile from vessels so engaged; it also requires all vessels (including fishing craft) to pass buoys, marking the position of cables, at a distance of one-quarter of a nautical mile. Offences created by the treaty are triable in the courts of the state to which the vessel committing the offence belongs, and proceedings and trials are to take place as summarily as the laws of such state will permit. No provision is made for the neutrality of submarine cables, or for their use in war; indeed, the convention contains a clause providing that its stipulations shall "in nowise affect the liberty of action of belligerents."[1]

[1] Treaties and Conventions of the United States, 1776–1887, pp. 1176–1185. By a clause of this treaty the commanding officers of public armed vessels of the contracting parties, if they have reason to believe that a merchant vessel has committed an offence in violation of the treaty, are authorized to require the captain of such vessel to furnish evidence of nationality, and such reports in respect to offences against the treaty as they may submit may be used in evidence in the courts of the state whose flag and papers such offending vessel may carry. A subsequent declaration respecting the interpretation of articles ii. and vi. of the convention was signed at Paris on December 1, 1886, and a final protocol, signed at Paris on July 7, 1887, fixing upon May 1, 1888, as the date upon which the instrument was to become finally operative, were ratified by the United States on May 1, 1888.—Treaties and Conventions of the United States, pp. 1184, 1185. For other correspondence in respect to the execution and operation of this convention, see Foreign Relations of the United States, 1883, pp. 253–258, 294–296, 285–291, 296–298, 304, 305; Ibid. 1887, pp. 360–368. The United States, by an Act of Con-

Acquisition of Territory. Territory may be acquired in several ways, of which the principal are:

(*a.*) *By Occupation.* This method is applied to the acquisition of those portions of the earth's surface which are either unoccupied by man, or are inhabited by savage or uncivilized races, who are unable, or who have not the desire, to establish those relations of intercourse with other states which are recognized by the rules of international law. As little territory remains in the world which is absolutely unoccupied, it follows that future acquisitions can only be made at the territorial expense of weak or uncivilized races;[1] such, indeed, are the acquisitions which are now being made by the different states of Europe in the continents of Asia and Africa. In some instances the title to territory thus acquired is purchased from the prior occupants; in a great majority of cases, however, it is obtained by an exercise of superior force.

(*b.*) *By Accretion.* This method of acquiring territory results from an operation of the laws of nature, and consists in the acquisition of soil, on the banks of rivers, due to the erosive action of the current. Such an increase in the territory of a state implies a corresponding diminution in the territory of another.[2]

(*c.*) *By Treaty.* This method of acquisition corresponds to the alienation of real estate among private individuals; the treaty of cession corresponding to the deed of conveyance, which operates to transfer the ownership of land from one

gress which was approved by the President on February 29, 1888 (25 Statutes at Large, p. 41), made suitable provision for the enforcement of the treaty, in so far as its citizens or other persons subjected to its jurisdiction were concerned. See vol. xii. Revue de Droit International, pp. 247–275; xv. ibid. pp. 17–43.

[1] One of the paragraphs in President Monroe's message in 1823, which has sometimes been erroneously regarded as a complete statement of the Monroe doctrine, contained the declaration that "the American continents, by the free and independent condition which they have assumed and maintained, are not to be considered as subjects for future colonization by any European power. See also Revue de Droit International, vol. xviii. p. 236; vol. xx. p. 605; Jones *vs.* United States, 137 United States, 202; Smith *vs.* United States, 137 United States, 224.

[2] See the article, p. 46, entitled "Rivers as Boundaries."

person to another. The consideration actuating the transfer may be pecuniary, or there may be an exchange of portions of territory, or the transfer may be made in deference to the wishes of the inhabitants of the ceded district.[1]

(*d.*) *By Conquest, or by Conquest Completed by a Treaty of Peace.* Such acquisitions of territory are in the highest degree involuntary, being accomplished, in every case, by an exercise of superior force; such transfers, however, are none the less recognized at international law, and titles based upon conquest are as valid as those obtained by the consent of the interested states.[2]

[1] The Louisiana territory, Florida, the Gadsden purchase, and the territory of Alaska are examples of acquisitions by treaty; the consideration in each case being pecuniary.

[2] The territory acquired from Mexico in consequence of the war with that power in 1845–1848, Cuba, Porto Rico, in the Western Continent, Alsace-Lorraine in Europe, and the territories acquired by Russia in Europe, and by the United States in Asia, are examples of acquisitions of territory by conquest perfected by treaty; the acquisition of territory from Mexico by the United States in 1848 was also made the subject of a pecuniary indemnity, as was the case with the acquisition of the Philippine Islands by the same power in 1898. The conquest of a country or portion of a country by a public enemy entitles such enemy to the sovereignty, and gives him civil dominion as long as he retains his military possession. Inhabitants and strangers who go there during the occupation of the enemy must take the law from him as the ruler *de facto*, and not from the government *de jure* which has been expelled.—IX Opinions of Attorney-General, p. 140. But a territory conquered by an enemy is not to be considered as incorporated into the dominions of that enemy, without a renunciation in a treaty of peace, or a long and permanent possession. Until such incorporation, it is still entitled to the full benefit of the law of postliminy.—United States *vs* Hayward, 2 Gallison, 501. A revolutionary party, like a foreign belligerent power, is supreme over the country it conquers, as far and as long as its arms can carry and maintain it.—IX Opinions of Attorney-General, p. 140. By the conquest and occupation of Castine, that territory passed under the temporary allegiance and sovereignty of the enemy. The sovereignty of the United States over the territory was suspended during such occupation, so that the laws of the United States could not be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors.—Ibid. 2 Gallison, 501; Hall, §§ 205, 206; Dana's Wheaton, § 346, note 169. Rights of private property, in territory acquired by conquest, undergo no change as a consequence of the fact of conquest.—United States *vs.* Percheman, 7 Peters, 51–87; III Phillimore, pp. 863–868; II Halleck, pp. 505–507; Strother *vs.* Lucas, 12 Peters, 410.

SERVITUDES

Origin and Application of the Term. The term *servitude* is borrowed from the Roman law, and is applied in the international relations of states to express an obligation upon the part of one state to permit a thing to be done or a right to be enjoyed, by another state, within or upon its territory. The thing done, or the right enjoyed, however, must not be sufficient in amount or importance to constitute a restriction upon the sovereignty or independence of the servient or subordinate state.[1] The state enjoying the benefit or privilege of the servitude is called the *dominant state.* The state lying under the obligation involved is called the *servient state.* The existence of a servitude is not inconsistent with entire sovereignty and independence on the part of the servient state. The following examples are illustrations of servitudes: Suppose two states, A and B, to be separated by a river; A may lie under a servitude to B not to construct works of improvement upon the boundary river which shall injure the opposite bank. Suppose two states, C and D, to be situated, one above the other, upon the course of a navigable river, the mouth and lower waters being situated in the territory of C; C may lie under a servitude to D of allowing its citizens the privilege of navigating the river to the sea; D may lie under an obligation to C not to use the banks of the river within the territory of C for the purpose of loading and unloading cargoes.

How Created and Terminated. Servitudes may exist by immemorial prescription, such existence being tacitly or expressly recognized by other states. Such, in great part, was the case of the Danish Sound Dues. They may also be created by treaty, and may be amended, increased, or modified in the same manner. They may be extinguished by treaty, by

[1] Under the name of easements the principle of servitudes is recognized by the common law, with this difference, however, that whereas a servitude could have been imposed upon an individual or his property by the sovereign authority of the state, an easement must, according to the common law, originate in an agreement between the interested parties.

non-user, and in some cases by forcible denial of the obligation. They must consist in an obligation to allow a thing to be done, or a right to be exercised, or in refraining from doing a thing; they can never consist in an obligation to do a thing.[1] They are further classified into *positive* and *negative*. A *positive servitude* consists in allowing a thing to be done, or a right to be exercised upon the territory of the servient state; a *negative servitude* consists in refraining from the exercise of a right by a servient state.

Examples of Servitudes. The following examples of servitudes created by treaty are cited by Phillimore:[2]

(1.) In the treaty of Utrecht, of 1713, between England and France, it was agreed on the part of France that the Stuart pretenders should not be permitted to reside in French territory.

(2.) In the treaty of Utrecht, between Spain and England, the possession of Gibraltar by the latter power was confirmed by Spain on condition that Moors and Jews should not be permitted to reside there.

(3.) The treaty of Paris, of 1814, provided that Antwerp was to be an exclusively commercial port.

(4.) By the treaty of 1831 certain Belgian fortresses were to be demolished by December 1, 1833.

Extra-territorial Jurisdiction of a State

Nature and Extent. It has been seen that sovereignty and territory are, in general, conterminous; under certain circumstances, however, a state may exercise jurisdiction over its subjects beyond its strict territorial limits; this extension of jurisdiction is sanctioned in the following cases:

(*a.*) Over its merchant vessels on the high seas; in matters which relate exclusively to persons on board, this jurisdiction, as will presently be seen, follows them into the ports and ter-

[1] I Phillimore, § 281; Morey, Outlines of Roman Law, pp. 288–292.

[2] I Phillimore, §§ 281–283; Heffter, § 43; Klüber, §§ 137–140.

ritorial waters of foreign states into which they may pass in the prosecution of a voyage.

(*b*.) Over crimes committed by its subjects in territory occupied by savages, or unoccupied, and not claimed by any civilized power. If this jurisdiction were not assumed such crimes as kidnapping, engaging in the slave-trade, etc., would go unpunished. For this reason most states, in their municipal laws, provide for their trial and punishment.

(*c*.) Over the crime of piracy, by whomsoever committed, on the high seas, or on land without the jurisdiction of any civilized state.

A similar immunity from local jurisdiction attends its public armed vessels, its armies in the field, and other organized bodies of its land-forces, its sovereign, its ambassadors and public ministers, and, in certain cases, its consular representatives; these will presently be discussed under the head of "Ex-territoriality."[1]

Merchant Vessels on the High Seas. Merchant vessels on the high seas are, for purposes of jurisdiction, acknowledged to be a part of the territory of the state whose papers they carry; crimes, by whomsoever committed, and causes of action arising on board, to which passengers or members of the crew are parties, are triable by its courts; such jurisdiction in criminal cases is not affected by the fact that the accused is a foreigner to the nationality of the ship, the case being precisely the same as if the offence had been committed within the territorial limits of the state under whose flag she sails.[2] From

[1] I Halleck, chap. vii. §§ 24–26; Manning, pp. 117–122; Hall, §§ 47–61; I Ortolan, chapters ix. and x.; Lawrence, Int. Law, § 120; Dana's Wheaton, § 95.

[2] *Case of John Anderson:* Anderson was a British subject and was employed as an ordinary seaman on board a vessel carrying the American flag. On January 31, 1879, while on the high seas, Anderson assaulted and killed the chief mate of the vessel on which he was employed. On the arrival of the ship in Calcutta, Anderson was arrested by the local authorities on a charge of manslaughter, for which he was tried and convicted. Upon the representations of the United States the British Government expressed its regret at the action of the local authorities, and its substantial concurrence in the views above set forth in respect to criminal jurisdiction on the high seas.—I Dig. Int. Law, §§ 33, 33a; I Halleck,

this principle it follows that, in time of peace, these ships are exempt from visitation and search by foreign vessels of war, except in strict accordance with treaty stipulations. They are subject, however, to such visitation and examination by public armed vessels of their own nation as may be authorized by its municipal laws.[1]

Merchant Vessels in Foreign Ports. So soon, however, as a merchant ship enters a foreign port it is subject in certain respects to the municipal laws, and especially to the criminal jurisdiction of the country in which the port is situated. For any unlawful acts done by her while thus lying in the port of a foreign state, and for all contracts entered into while there, by her master or owners, she is made answerable to the laws of the place; nor can an immunity from the operation of the local law be claimed for her master or crew if they break the peace or disturb public order in such port by the commission of crimes. But the comity and practice of nations have established the rule of international law that such vessel, so situated, is, for the general purpose of governing and regulating the rights, duties, and obligations of those on board, to be considered as a part of the territory of the nation to which she belongs.[2] It therefore follows that acts happening on board which do not concern the tranquillity of the port, or affect persons foreign to the crew, are not amenable to the local jurisdiction; such matters being, as a rule, justiciable only by the courts of the state to which the vessel belongs.[3]

chap. vii. § 24; Wheaton, part ii. chap. ii. § 106; Vattel, liv. i., chap. xix. § 216; Grotius, liv. ii. chap. iii. § 13; I Ortolan, chap. xiii.; V Pradier-Fodéré, §§ 2263-2265. See also the article on "Exterritoriality," by M. Jules Valery, in Revue de Droit International, vol. xxix. pp. 5-25; Crapo *vs.* Kelly, 16 Wallact, 610; Wilson *vs.* McNamee, 102 U. S. 574; *Re* Moncan, XIV Fed. Rep. 44.

[1] I Ortolan, chap. xii.; Woolsey, § 54; I Halleck, chap. vii. § 20; I Dig. Int. Law, § 33; Hall, § 45; Lawrence, Int. Law, § 120.

[2] I Halleck, chap. vii. § 26; Wheaton, part ii. chap. ii. §§ 101, 102; Vattel, liv. i. chap. xxiii. §§ 290, 295; I Ortolan, chap. xiii.; Hall, §§ 58, 59; Woolsey, § 68; V Pradier-Fodéré, §§ 2417-2437.

[3] I Halleck, chap. vii. § 26. The principle which goyerns the whole matter is this: disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of

Wildenhus Case. This occurred in October, 1886. The steamer *Noordland*, a merchant vessel carrying the Belgian flag, was lying at its pier in Jersey City, a place within the territorial jurisdiction of the State of New Jersey. During an affray which occurred on board the vessel, Wildenhus made a murderous assault upon one Fijens, both being members of

the home of the ship; but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in the regular way, the consul has no right to prevent it.—Wildenhus *vs.* United States, 120 United States, 1. Elsewhere, in the discussion of the same case, the court makes use of the following language: "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board, which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should by the government be left to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of such a character as to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority."—Wildenhus *vs.* United States, 120 United States, 1. Merchant ships are a part of the territory of their country, and are so treated on the high seas, and partially, but not wholly so, while in the territorial waters of a foreign country. Crimes committed on board ship on the high seas are triable in the country to which she belongs. In port, the local authority has jurisdiction of acts committed on board of a foreign merchant ship while in port, provided those acts affect the peace of the port, but not otherwise; and its jurisdiction does not extend to acts internal to the ship, or occurring on the high seas. The authority of the ship's country in these cases is not taken away by the fact that the actors are foreigners, provided they be of the crew or passengers of the ship. The local authority has right to enter on board a foreign merchant-man in port for the purpose of inquiry universally, but for the purpose of arrest only in matters within its ascertained jurisdiction.—The *Atlanta*, VIII Opinions of Attorney-General, p. 73.

the crew of the *Noordland*. Wildenhus was arrested by the local authorities under a charge of murder, whereupon a petition was presented to the United States Circuit Court for the Eastern District of New Jersey, for a writ of habeas corpus, with a view to secure the release of the offender in order to cause him to be transferred to the custody of the Belgian consul. This on the ground that, by the law of nations, and in accordance with the terms of the treaty of 1880, between the United States and Belgium, the State of New Jersey was without jurisdiction in the case. The application for the writ was denied and the prisoner was remanded to the custody of the state authorities, and the case was carried to the Supreme Court of the United States on appeal. It was there decided that article xii. of the treaty of March 9, 1880,[1] between Belgium and the United States, conferring power upon Belgian consuls in the United States to take cognizance of differences between captains, officers, and crews of Belgian merchant vessels in the ports of the United States, and providing that the local authorities shall not interfere except when a disorder arises of such a nature as to disturb tranquillity or public order on shore or in the port, does not apply to a case of felonious homicide committed on board a Belgian merchant vessel in a port of the United States; and does not deprive the local authorities of the port of jurisdiction over such a crime, committed by one Belgian upon the person of another Belgian, both belonging to the crew of the vessel.[2]

Cases of the "Sally" and the "Newton." The *Sally* was an American merchant vessel in the port of Marseilles, and the *Newton* was a vessel of the same character in the port of Antwerp, then under the dominion of France. In the case of the *Sally*, the mate, in the alleged exercise of discipline over the crew, had inflicted a severe wound upon one of the seamen; in that of the *Newton* one seaman had made an assault on an-

[1] Treaties and Conventions of the United States, 1776–1887, pp. 80–84.

[2] Wildenhus *vs.* United States, 120 United States, 1. See also Reg. *vs.* Keyn, L. R. 2 Exch. Div. 63; I Dig. Int. Law, §§ 35, 35a.

other seaman in the vessel's boat. In each case the proper consul of the United States claimed exclusive jurisdiction of the offence, and a similar claim was advanced, in each case, by the authorities of the port. The French Council of State pronounced against the jurisdiction of the local tribunals. This was clearly because the things done were not such as to disturb the peace or tranquillity of the port.[1]

The Principle of Exterritoriality

Definition; Application. In a limited number of cases states permit the jurisdiction of other states to be exercised within their territory. This is called the principle of *exterritoriality*. It is a fiction of law, invented to explain certain immunities and exemptions from the local law, which are recognized by all nations in their dealings with each other. It does not explain all of the circumstances that may arise in any of the cases to which it is applied, but it accounts for many, or most of them, more satisfactorily than does any other method of treatment that has been proposed.

From the definition of a sovereign state it is apparent that such an exercise of jurisdiction can only be possible with the tacit or express consent of the state within whose territory it is exercised.[2] It is therefore based upon comity, and is held to apply in the following cases:

(1.) **To Ships-of-War in Foreign Ports.** It has been seen that the public armed vessels of a state, while on the high seas, are, like those of its merchant marine, subject only to the law of the state under whose flag they sail. By the general consent of nations this immunity from local jurisdiction is extended, in the case of public armed vessels, to cover the period of their sojourn in the ports or other territorial waters of a foreign state. There has been considerable discussion as to whether the exemption accorded to ships-of-war can be

[1] Dana's Wheaton, §§ 103, 104, note 63; Snow, Leading Cases, p. 121; Pitt-Cobbett, Leading Cases, p. 74; I Ortolan, Diplomatie de la Mer, p. 271; Annexe J. p. 445; I Phillimore, 352.

[2] Case of the *Exchange*, 7 Cranch, 116, 136.

claimed as a matter of strict right, or is based upon the comity of nations. The latter view is now generally accepted. The board of arbitration in the Geneva case ruled that "the privilege of exterritoriality accorded to vessels of war has been admitted into the law of nations; not as an absolute right, but solely as a proceeding founded on the principles of courtesy and mutual deference between different nations."[1] In this view Phillimore and Story agree.[2]

If, for reasons of state, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or the vessels of war of any particular nation, notice is usually given of such determination. If there is no such prohibition the ports of a friendly nation are considered as open to the public ships-of-war of all powers with whom it is at peace, and those vessels are supposed to enter such ports and remain in them under the protection of the government of the place.[3]

Extent of the Privilege. War vessels are subject to the jurisdiction of the port in matters of quarantine, and are required to obey the local revenue laws and the port regulations on the subject of anchorage, lights, and harbor police.[4] They may be compelled, by force if need be, to observe such regulations as may be deemed necessary, by the state in whose ports they may be, for the maintenance of its neutrality.

The privilege of exterritoriality does not apply to members

[1] Decision Geneva Tribunal, p. 184.

[2] A public armed vessel, in the service of a sovereign at peace with the United States, is not within the ordinary jurisdiction of our tribunals while in a port of the United States. But the sovereign power of the United States may interpose and impart such jurisdiction. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them, while allowed to remain, under the protection of the government of the place. The implied license, under which such vessel enters a friendly port, may reasonably be construed, and, it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality. — The *Exchange*, 7 Cranch, 116; The *Santissima Trinidad*, 7 Wheaton, 283; I Phillimore, § 344.

[3] Case of the *Exchange*, 7 Cranch, 141.

[4] I Halleck, pp. 188, 189; I Ortolan, chap. x.; Hall, § 55; Snow, Leading Cases, pp. 33–36.

of the ship's company on shore. The local laws apply to them, under such circumstances, as fully and strictly as to any citizen of the state, or to any foreign sojourner. Crimes committed by officers of a public armed vessel or by members of its crew on shore, therefore, may not only be judicially noticed by the local tribunals, but may be made the subject of complaint in the diplomatic way.[1]

Exemption from Process. The exemption of ships-of-war from local jurisdiction and process has been authoritatively discussed by Chief-justice Marshall in the case of the *Exchange*. "If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace; and those vessels are supposed to enter such ports and remain in them under the protection of the government of the place. Whether the public ships-of-war of one nation enter the ports of another friendly nation

[1] Bluntschli, Le Droit International Codifié, liv. iv. § 321; Pinheiro Ferreira, Cours de Droit Public, tit. ii. art. xviii. § 50; Hautefeuille, Droit des Nations Neutres, tome i. p. 349; I Halleck, p. 190. The privilege stands upon principles of public convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into home ports and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. "But as such consent and license are implied only from the general usage of nations, they may be withdrawn upon notice at any time without just offence; and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as are other vessels." But, unless withdrawn, it is presumed to be conceded. And it is now settled that foreign ships-of-war and boats, the particular property of a foreign sovereign, are not liable to process, though the ships and boats be at the time of the cause of action in the territorial waters of the state of process. — The *Exchange*, 7 Cranch, 116, 145; the *Santissima Trinidad*, 7 Wheaton, 283; I Dig. Int. Law, § 36. A foreign ship-of-war, or any prize of hers in command of a public officer, possesses, in the ports of the United States, the rights of exterritoriality, and is not subject to the local jurisdiction. A prisoner of war on board a foreign man-of-war, or of her prize, cannot be released by habeas corpus issuing from courts either of the United States or of a particular state. But if such prisoner of war be taken on shore, he becomes subject to the local jurisdiction or not, according as it may be agreed between the political authorities of the belligerent and neutral power. —The *President* and Prize, VII Opin. Att.-Gen. p. 122 Cushing (1855); V Pradier-Fodéré, §§ 1360–2400.

under the license implied by the absence of any prohibition, or under an express stipulation by treaty, they are equally exempt from the local jurisdiction."[1]

Case of the "Sitka." In 1856, during the continuance of the Crimean War, the *Sitka*, a Russian vessel which had been captured by a public armed vessel of Great Britain, entered the port of San Francisco. She was navigated by a prize-crew which conferred upon her the character of a public armed vessel, and she had on board, at the time of her entry, several Russian prisoners. A writ of habeas corpus was issued by a court of the State of California and served upon the commanding officer of the *Sitka*, who sailed out of the harbor, without making the required return to the mandate of the writ. The matter was brought to the attention of the United States Government, by whom it was referred to the Attorney-General for an opinion as to the question of jurisdiction involved. It was held by that officer that a prisoner of war, on board a foreign ship-of-war, could not be released by a writ of habeas corpus issued by a court of the United States, or by the court of a particular state; on the ground that, so long as such prisoner remained on board the ship, they were in the territory and jurisdiction of their sovereign. There the neutral had no right to meddle with them. It was held, however, that if such prisoner be taken on shore, he becomes subject to local jurisdiction, or not, according as it may be agreed between the political authorities of the belligerent and neutral power.[2]

Case of the "Maine." The United States battle-ship *Maine* entered the harbor of Havana, Cuba, on January 25, 1898. Immediately upon her arrival, the customary civilities were exchanged and the vessel was conducted, by a government pilot, to the anchorage assigned her, as a foreign vessel of war, by the local naval authorities. Here the ship remained at

[1] Case of the *Exchange*, 7 Cranch, 116; the *Santissima Trinidad*, 7 Wheaton, 325; I Halleck, chap. vi. §§ 25, 26; Wheaton, § 101; Hall, § 44; I Ortolan, Diplomatie de la Mer, liv. ii. chap. x.; Heffter, § 79; Foelix, liv. ii. title ix. chap. i.; Hautefeuille, title vi. chap. i. § 1; Bluntschli, § 321.

[2] Pitt-Cobbett, Leading Cases, p. 36; Hall, p. 189; VII Opinions of Attorney-General U. S. p. 122.

anchor for a period of about three weeks. During that time it does not appear that any special measures of precaution were resorted to by the Spanish Government with a view to insure the safety of the visiting vessel. At 9.40 P.M. on February 15th, being at the time moored to the buoy assigned her upon her arrival, the *Maine* was destroyed by the explosion of a submarine mine which caused the incidental explosion of one or more of her forward magazines. A naval court of inquiry was immediately convened by order of the United States Government, which, after a careful and exhaustive investigation of the circumstances, reached the opinion that the destruction of the vessel was caused by the explosion of a mine exterior to the ship, and was not due to the fault or negligence of her officers or crew. An inquiry instituted by the Spanish Government, after a less complete investigation, is believed to have reached a different conclusion; but the position of certain parts of the ship's structure, in consequence of the explosion, including portions of the keel, the outer shell, and the outside bottom plating, were such as to offer conclusive proof that the destruction was due to an exterior explosion.[1] By whom and under what circumstances the destruction was caused has never been determined. It is proper to say, however, that the act was promptly disclaimed by the local colonial authorities, and it has never been authoritatively suggested that the injury was ordered, or authorized, or even countenanced, by any branch or portion of the governmental authority of Spain.

Although the relations existing between the governments of the United States and Spain were strained at the time of the occurrence, the circumstances attending the entry of the vessel were by no means unusual, and the visit was not made until a conference had been had with the Spanish minister in Washington, in which the renewal of the visits of public armed vessels of the United States to Spanish waters had been discussed

[1] Message of President McKinley of March 28, 1898, transmitting to Congress the proceedings and finding of the *Maine* Court of Inquiry.

and accepted, and the governmental authorities at Madrid and Havana had been advised of the purpose of the United States Government to resume friendly naval visits at Cuban ports, and that in that view the *Maine* would forthwith call at the port of Havana.[1]

The case is novel at international law in that it gives rise to a question as to the nature and extent of the responsibility incurred by a state which, under the circumstances above set forth, permits a foreign vessel of war to enter its territorial waters. The rule of international law applying to the case is believed to be correctly stated by Chief-justice Marshall in the case of the *Exchange* in the following terms: Unless closed by local law, "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them, while allowed to remain, under the protection of the government of the place."[2] The privilege of exterritoriality is admitted to extend only to the officers and crews of public armed vessels, and goes no further than to exempt the vessel and crew from the operation of the local laws. It confers no authority upon the officers of a visiting vessel to resort to measures of defence, or of precautionary police, outside the ship, or within the territorial waters of the state in whose harbor it is anchored; for such protection from purely external injury the ship must rely upon the efforts of the local authorities, whose duty and responsibility it is to resort to such measures of precaution as are suggested by the emergency of the occasion.

Where independent nations are concerned, the degree of care to be shown by one state in order to prevent injury to another, where such duty of prevention exists, is perhaps best described by the term "due diligence"; this means something more than, and different from, "reasonable care," as that term is used in describing the corresponding obligation owed by one

[1] Message of President McKinley of March 28, 1898, transmitting to Congress the proceedings and finding of the *Maine* Court of Inquiry.

[2] The *Exchange*, 7 Cranch, 116, 141.

individual to another, or to the public, and implies that the diligence used in the prevention of injury must be proportioned to the risk of such injury occurring to the vessel of a friendly nation which may happen to enter its ports or territorial waters. The duty of protection, and the expediency of resorting to special precautionary measures, upon the occasion of a public armed vessel entering even a friendly harbor, are suggested by the fact that the crew are not only strangers to the port, but are members of a different nationality, and thus occupy a very different relation from that of ordinary aliens; in the case of the *Maine*, a resort to such preventive measures was not only sanctioned by the rules of international law, but required by express treaty stipulations, and strongly suggested by the strained relations existing between the United States and Spain.

If, in view of the local situation, or in consequence of its strained relations with the government of the United States, the Spanish Government was either unable or unwilling to charge itself with the safety and security of the *Maine*, it should have withheld its consent to the entry of the vessel into its territorial waters; failing to do this, that government was justly held responsible for the disaster which ensued upon its failure to exercise the diligence which was demanded by the circumstances of the case.

Case of the "Baltimore." During the years 1890 and 1891 a revolutionary movement had been in progress in Chili which had terminated in the overthrow of the Balmaceda government. During its continuance there had been complaints on the part of the revolutionary party that partiality had been shown to their opponents by the government of the United States, in the detention of the *Itata*, a vessel engaged in the transportation of contraband of war to the insurgent forces. The action of the United States minister, in giving legationary asylum to the deposed President Balmaceda and his family, was also complained of. As a consequence, there was a strong popular feeling against the United St tes in Santiago, the capital of the republic, and in Valparaiso, its princi-

pal seaport. While the relations of the two governments were still in a condition of considerable tension, the commanding officer of the United States steamship *Baltimore* gave shore liberty to 117 of his petty officers and seamen in the port of Valparaiso. An outbreak resulted, in which one seaman was killed, one mortally wounded, and seventeen others were more or less severely injured. After waiting a reasonable time for such action to be taken as seemed to be warranted by the importance of the case, a demand was made by the United States for redress on the ground that the public authorities of Valparaiso had failed to protect the sailors, who were on shore liberty from the war vessel of a friendly power, and that the seamen of the *Baltimore* had been assaulted — not because they were foreign sailors — but because of their American nationality. The disclaimer of the Chilian Government not being deemed satisfactory by the President of the United States, the matter was made the subject of a special message to Congress. The affair was finally settled by the payment of a money indemnity to the injured seamen and to the families of those who had lost their lives in consequence of the failure of the local authorities to afford them adequate protection.[1]

Case of the "Constitution." The *Constitution*, a public armed vessel of the United States, while engaged in the transportation to New York of a portion of the American exhibit at the Paris Exposition of 1867, stranded on the English coast near Swanage, and was obliged to accept the services of several tugs and wrecking vessels in order to enable it to resume its voyage. Suit for the payment of salvage was instituted in the proper admiralty court, where it was decided that, in the case of a ship-of-war, there was a complete exemption from local jurisdiction, including the service of process against the ship. The case was therefore dismissed with costs,[2] and the

[1] Executive Document No. 91, House of Representatives, U. S., Thirty-second Congress, first session; Foreign Relations U. S. 1892, pp. 52–57, 61–64, 67; Revue de Droit International, vol. xxiii. pp. 588, 589; Snow, Int. Law, p. 63. For the case of the *Itata*, from the point of view of neutrality, see the chapter entitled NEUTRALITY.

[2] 48 L. J., N. S., P. D. and A. 13; Pitt-Cobbett, Leading Cases in Int.

claim was subsequently settled by a voluntary payment on the part of the United States Government.

Asylum on Public Armed Vessels. It is now well settled that no right of asylum exists, in behalf of criminal offenders, on board the public armed vessels of a state while in foreign territorial waters. Where, however, the offence is political, as distinguished from criminal, the usage of nations still authorizes such asylum to be extended to a political refugee, by the commanding officer of a ship-of-war, but only in countries where insurrections are of frequent occurrence and where political institutions are unstable and subject to constant and violent changes. In such localities requests for asylum should be refused except in extreme and exceptional cases, such as the pursuit of a refugee by a mob, or where such action is necessary to save life.[1]

Offences Committed on Shore. Where offences are committed on shore by officers or members of the crew of a public armed vessel, no immunity from local jurisdiction can be claimed, and such offences may be punished by the authorities of the port, or the offenders may be handed over to the commanding officer of the ship, with a view to their trial and punishment in accordance with the laws of the state under whose flag they sail. It is not unusual, however, where minor infractions of order are in question, and especially where no injury has been inflicted upon a citizen of the state within whose territorial waters the ship happens to be, for the release of the offenders to be requested by their commanding officer.

Law, p. 34; see also the case of the *Charkieh*, L.R. 4, A. and E. 49; Pitt-Cobbett, Leading Cases, 6–9; I Dig. Int. Law, § 36.

[1] The United States Navy Regulations contain the following requirement: "The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, local usage sanctions the granting of asylum, but even in the waters of such countries officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum." —U. S. Navy Regulations, par. 288, edition of 1896.

While such release is granted in most cases, the local authorities are under no obligation to comply with the request, as such offenders are fully liable to the local law, for criminal offences committed within its jurisdiction.[1]

(2.) **Passage of Troops through the Territory of a Foreign State.**—This practice was much more frequent in former times than it is at present. The increasing strictness with which the rules of neutrality are now observed has rendered the practice obsolete in war, and the generally cherished desire to avoid international complications, by removing one of the most fruitful causes of international misunderstanding, has contributed powerfully to diminish its frequency in time of peace.[2] Permission for such movements is now rarely accorded, save in very exceptional cases—as to an ally in war, or as an act of courtesy or humanity in time of peace. In the few instances in which it is permitted, the conditions of the movement are arranged, with great minuteness of detail, in a preliminary treaty or agreement.[3]

[1] V Pradier-Fodéré, § 2408; Ortolan, liv. ii. chap. iv. tit. i. p. 309; I Phillimore, § 346; I Halleck, p. 190; Walker, Manual, § 27, p. 79; Walker, Int. Law, pp. 123–134; Hall, § 55.

[2] The application of the principle of exterritoriality to the passage of troops through the territory of a friendly state is well explained by Chief-justice Marshall in the case of the *Exchange:* "A third case in which a sovereign is understood to cede a portion of his jurisdiction is where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it is applicable, and would be withdrawn from the control of the sovereign, whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require." — Case of the *Exchange*, 7 Cranch, 116–139.

[3] The passage of a detachment of British troops through the State of Maine, in 1862, while en route to Quebec, Canada, was authorized by the United States as a matter of comity; in 1875 similar permission was granted for the passage of

The practice is disfavored, but not absolutely forbidden, by international law. The outbreak of war, therefore, or the existence of an emergency, may make it necessary to resort to it at any time. Should such a case occur, the principle of exterritoriality would apply to a movement of troops through foreign territory in the same way, and to the same extent, that it is applied in the admission of a ship-of-war to a foreign port. Its application would be attended with greater difficulty, however, arising in part out of the character of the act itself, and in part from the occurrence of circumstances, during the passage, which could not be provided for in advance. This would be especially true if the movement were effected by marching, and not by railway or steamer.

The moving force is governed, in transit, by the military laws and army regulations of its own government, with such additional restrictions as may be stipulated to be observed in the treaty or agreement authorizing the passage. Offences committed along the line of march are tried by courts-martial, or are punished summarily, when the offending and injured persons belong to the moving force. If the parties injured be citizens of the district traversed, the trial and punishment of the offenders would be arranged for by treaty. As such offences have a peculiarly aggravated character, they should be more severely dealt with than if committed at home.

certain military supplies for the use of the Canadian mounted police, a body having a permanent military organization and constituting a portion of the British colonial establishment; permission was also granted in 1876 for the passage of a small body of Mexican troops from Brazos de Santiago to Matamoras, through the territory of the State of Texas. In 1881 the permission of the Governor-General of Canada was obtained for the passage of a body of Michigan state militia through the territory of the Dominion of Canada, while en route from Detroit to Buffalo. The right of the United States to send troops across the Isthmus of Panama is guaranteed by the treaty with New Granada of 1846.—Treaties and Conventions of the U. S. 1887, pp. 195–206. It has been announced, in behalf of the government of the United States, that permission to transport troops over its territory will only be granted in case of peaceful transfer, devoid of any military object affecting the peace of any third state.—1 Dig. Int. Law, § 13. See also Revue de Droit International, vol. xxi. p. 117.

Questions of purchasing supplies in the country passed through are strictly regulated by treaty, as are similar questions arising as to the quartering of troops, the passage of ferries and bridges, and the use of wells or other sources of water supply. When such movements are made, as it is impossible to foresee and provide for all cases of injury and damage that may occur, it is proper to provide, in the preliminary treaty, for the indemnification of injured parties, by permitting their claims to be submitted in the diplomatic way, or by arranging for the organization of a commission having power to investigate such claims, and to determine the amount of damage sustained, with a view to its being liquidated by the government through whose agents it was inflicted.[1]

(3.) **To the Person of a Sovereign, his Retinue and Attendants, while Passing Through or Sojourning in Foreign Territory.** There are numerous instances of such royal visits, and the practice of making them bids fair to continue in existence, if, indeed, it does not become more frequent than formerly. At the present time such visits are not attended by the political significance which formerly attached to them. They are either made with great formality—as when a visit of ceremony is made or returned, or a conference of sovereigns is arranged, with a view to an exchange of opinions upon some matter of serious international concern—or they may have an entirely private and informal character, the visiting sovereign waiving many of the honors and privileges to which he is entitled in his sovereign character.

If the consent of the sovereign whose territory is visited has been formally given, such consent is held to confer the privilege of exterritoriality.[2] The visiting sovereign is

[1] Hall, § 54; I Twiss, § 165; I Dig. Int. Law, § 13; I Phillimore, §§ 341, 342; I Halleck, p. 177; II Ibid. p. 178.

[2] Full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be

permitted to exercise his functions as if he were still in his own dominions; and he may do any act which he is authorized to do by the laws of his own state, and which is not so repugnant to the law of the territory in which he is as to be forbidden to be exercised by its sovereign. Such acts, however, are presumed to have effect only within his own territory, and upon his own subjects. His control over his suite is not impaired, and their responsibility to him is in no way affected, by the fact of absence.[1] Whatever articles of personal or movable property are carried with him enter the foreign state without inspection or payment of duty, and are exempt from taxation and imposts of all kinds during his sojourn there. In all other respects the privilege of exterritoriality applies to a sovereign, and to his retinue and train, in precisely the same manner, and to the same extent, that it does to an ambassador and his retinue.

supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.—Schooner *Exchange vs.* McFaddon, 7 Cranch, 116 [137].

If a foreign sovereign enters the territory of a sovereign state, he does so with the knowledge and license of its sovereign, and "that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation." "A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case."—Case of the *Exchange*, 7 Cranch, 116, 137.

[1] To what extent the judicial power which attaches to a sovereign in his own dominions may be exercised by him abroad has never been satisfactorily determined. In the leading case of Queen Christina of Sweden, she had formally abdicated the Swedish crown, was residing in Paris where she seems to have enjoyed the privileges of exterritoriality. While residing in Paris, in 1657, she caused one Monaldeschi, a member of her suite, to be put to death. This act has been universally condemned by text writers of authority, and the queen is usually regarded as having subjected herself to the criminal jurisdiction of the French courts by thus causing the death of her chamberlain.—II DeMartens, Causes Célèbres; Bynkershoek, DeForo Leg. chap. iii.; Hallam, Const. Hist. of England, chap. iii.; II Phillimore, p. 142.

Should a person of sovereign rank enter the territory of a foreign state without the permission of its sovereign or executive authority, he is conceded most of the immunities that are extended to him when such consent has been obtained.[1] The circumstances under which such visits are made may be, and frequently are, so peculiar and exceptional as to make it impossible to lay down any definite rules on the subject. If the presence of such a person is dangerous to the safety of a state, or involves its neutral obligations in any way, or is offensive to, or threatens its relations with, friendly powers, asylum may be refused, and the visiting sovereign may be forbidden to exercise any of his functions, or to maintain a correspondence with persons in his own state, and he may even be compelled to quit the territory. If no such consequences ensue, or are likely to ensue, the visit differs in no important respect, in so far as the application of the principle of exterritoriality is concerned, from one made with the consent of the sovereign of the visited territory.[2]

To Ambassadors and Public Ministers. To the efficient and successful performance of an ambassador's duties, it is necessary that his person should be held inviolate, and that he should be entirely free from responsibility to the government to which he is accredited. Without such freedom of movement and action it would be impossible for him to adequately represent his own government, or effectively interfere in behalf of his fellow-subjects. This principle of inviolability and immunity has been recognized by all Christian states since permanent legations were first established in Europe, in the fourteenth century. It is now so universally conceded as not to admit of question or discussion.

"Whatever may be the principle upon which this immunity is established, whether we consider 'the ambassador' as in the place of the sovereign he represents, or, by a political fic-

[1] Case of the *Exchange*, 7 Cranch, 116, 138; I Phillimore, § 342; II Ibid. §§ 100–113; Hall, § 49; Klüber, § 49; II De Martens, § 172.

[2] Hall, § 49; I Twiss, § 165; Bluntschli, §§ 135–153, 196–209; Klüber, §§ 49, 54, 136; Heffter, §§ 42, 54; II Phillimore, §§ 104, 105.

tion, suppose him to be extraterritorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides, still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it."[1]

The subject will be more fully discussed in the chapter devoted to the privileges and immunities of ambassadors.

To Consuls and to Foreign Residents in Certain Eastern Countries. From the beginning of intercourse with the Mohammedan nations inhabiting the southern and eastern coasts of the Mediterranean Sea it has been found necessary, by reason of the radical difference between their legal and religious systems and those prevailing among the Christian nations of Europe, to withdraw from the operation of the local laws such subjects of the latter powers as were obliged, on account of their business or official character, to reside in the Levantine ports and commercial cities. These exemptions have been obtained in every case by treaty stipulations or concessions, and they are enlarged and modified, from time to time, in the same manner. When intercourse became general with China and Japan similar concessions were obtained in behalf of the subjects of the principal commercial nations of Europe and America. The subject will be treated at length under the head of "Consular Jurisdiction."

Exterritoriality; Application of the Principle to Things. It is proper to observe, in conclusion, that the principle of exterritoriality, as recognized at international law, relates primarily to persons, and has to do with things only because of their relation to such persons as are clothed with an immunity from the operation of local laws. It applies to the hotel of an ambassador, for example, because it is his official residence, and it ceases to exist whenever he ceases to occupy it as an official residence. It applies also to the legationary furniture

[1] The *Exchange*, 7 Cranch, 116, 138.

and to other articles of personal property so long as he continues to use them in his official capacity as a public minister; when they are sold or otherwise disposed of, however, the privilege ceases to exist, and, with the transfer of possession, the articles become subject, in every respect, to the operation of the local law. Such, too, is the case with a public armed vessel; the privilege attaches to the ship on account of its occupation by its officers and crew; if, therefore, it be wrecked or destroyed and abandoned in the territorial waters of a foreign state, the privilege of exterritoriality ceases to attach and the ship becomes a mere article of property and, as such, subject to the law of the state in whose waters it lies.[1]

References. The theory of state sovereignty and jurisdiction is derived directly from the Roman law. Upon the application of that theory to the mutual relations of states is based the claim of Grotius to the honor of being the founder of the modern science. The first edition of his work, "De Jure Belli et Pacis," was published in Paris in 1625. It has been translated into almost all of the modern languages of Europe. The last French edition appeared in 1864. An English translation appeared in 1738. The usual English edition, however, is that of Dr. Whewell, which was published in 1853. The formal or constitutional classification of the powers of government is of relatively recent origin, and can be studied to advantage in the constitutions of modern states. See Cooley's "Constitutional Law," Cooley's edition of "Story's Commentaries," and Holmes's edition of Kent for the United States. For England, see Stubbs's "Constitutional History," Bagehot's "English Constitution," and the works of Hallam, Amos, and Maine. The rules regarding territory and territorial jurisdiction are largely adopted from the Civil Law. The principle of servitudes is of similar origin, although in the doctrine of easements a modified form of the principle is known to the Common Law. For an account of the Law of Servitudes, see Morey, "Outlines of the Roman Law," pp. 289–292; Bluntschli, §§ 353–359; I Phillimore, pp. 330–332. For the subject of the High Seas and the freedom of the sea, see Grotius, "Mare Liberum," written in reply

[1] Hall, § 55, p. 195; the *Charkieh*, L. R. iv. Adm. and Ecc. Cases, 93 and 96. See also the case of the *Constitution*, reported in the London *Times* of January 29, 1879; Woolsey, § 58; Bluntschli, §§ 333–336.

to Selden's "Mare Clausum." See also I Azuni, chaps. i.–iii.; I Phillimore, pp. 209–224; Vattel, chap. xxiii. §§ 279–294; Heffter, pp. 146–148; I Martens, G. F. De, § 43, and § 18 of Wheaton's "History of the Law of Nations." The fiction of exterritoriality is fully discussed in I Halleck, chap. vii. §§ 24, 26; Boyd's Wheaton, pp. 139, 151; Heffter, pp. 86–90; Creasy, pp. 176–190, and p. 686; Lawrence, "International Law," §§ 120–131; I Phillimore, chapters ix. x. and xi.; II Ibid. pp. 127–257; Walker, "Science of International Law," pp. 221–230; I Twiss, §§ 165, 166, 199–223; Bluntschli, §§ 69, 126–158, 317–342; I Dig. Int. Law, §§ 13, 17a, 17b, 26–40, 92–98; Dana's Wheaton, §§ 95–110, notes 58–68.

CHAPTER III

PERFECT AND IMPERFECT RIGHTS—COMITY—CEREMONIAL

Perfect Rights. The essential attributes of a state have been defined to be those of sovereignty, independence, and equality. Any state right fairly deducible from any one of these, or from all of them, is a perfect right. The right to resist invasion, to an immunity from external interference in purely internal affairs, and to protect its citizens from wanton injury while travelling or sojourning abroad are examples of perfect rights, and a state would be said to have a just cause for war if any one of them were deliberately violated. It is thus seen that the denial of a perfect right constitutes an invasion of the sovereignty of the offended state, justifying, if not atoned for, forcible measures of redress. If the sovereign rights of a state can be denied, trespassed upon, or invaded in one respect, they can in all respects, and its sovereignty and independence would be abridged, and finally lost, by such repeated invasions or denials. For these reasons the rule has received universal sanction that the perfect rights of a state can be drawn in question or denied only at the risk of war.[1]

[1] The statement that whenever a nation has a claim, clearly founded on justice, and justice is denied, resort must ultimately be had to war for redress for the injury sustained must be accepted with an important qualification. The denial of justice gives to the offended nation the right of resorting to arms, and such a war is just, so far as it relates to the offended party. "But to assert that a nation must in such a case, without attending either to the magnitude of the injury, and without regard either to its own immediate interest or to political considerations of a higher order, affecting perhaps its foreign and domestic concerns, inflict upon itself the calamities of war, under the penalty of incurring disgrace, is a doctrine which, if generally adopted, would keep the world in perpetual warfare, and sink the civilized nations of Christendom to a level with the savage tribes

Imperfect Rights. There is another class of state rights or duties to which attention will now be drawn. It has been seen that a state, in its capacity as a body politic, possesses many of the attributes of a moral person. It may express sympathy, it may perform acts of charity, humanity, or courtesy, and may be held morally responsible for their non-performance. The performance of such acts is incumbent upon a state for the same reason and to the same extent that it is incumbent upon an individual. Its failure to perform them, like a similar failure on the part of an individual, violates no perfect right, and is therefore not punishable, or a proper subject for forcible redress. As a nation is actuated to the performance of these duties by considerations of *courtesy* or *good-will*, and as a failure to observe them does not constitute a sufficient cause for war, they are called *imperfect rights;* or, since they are founded upon considerations of comity, or moral obligation, they are sometimes called *moral claims.*[1]

Perfect Rights.

Classification. The perfect rights of a state are susceptible of classification under one of two heads.

First. The right of a state to a free and independent existence within its territorial limits.

Second. The right to be respected as a sovereign state in its intercourse with other states.[2]

Some of the more essential of the perfect rights and duties of states are:

of our forests."—Gallatin to Everett, II Gallatin's Writings, p. 494. The action of the President, which is criticised in the foregoing extract, related to the measures resorted to with a view to secure a settlement of the French indemnity in 1835 and 1836. See also Pomeroy, § 79; I Halleck, chap. iv. § 1, chap. xiii. § 3; Woolsey, §§ 17, 18; Wheaton, § 60; I Phillimore, §§ 138–154; Vattel, prelim. chap., §§ 17–23.

[1] Dr. Woolsey was, I think, the first to use this term. It explains the obligation more fully than does the other, which is the more generally used. For further discussion of the subject of imperfect rights, see p. 116; see also I Phillimore, §§ 142, 143; Vattel, prelim. chap. § 17; Hall, § 13.

[2] Heffter, pp. 47, 48; Pomeroy, § 79; I Halleck, chap. iv. § 1; Woolsey, §§ 17, 18; I Phillimore, §§ 138–154.

The Right of Self-Preservation. This is called into being whenever the corporate existence of a state is menaced, and corresponds to the individual right of self-defence. The danger may be internal, as in the case of insurrection or rebellion, or external, as in the case of invasion, either real or threatened. "The right of self-preservation is the first law of nations, as it is of individuals. A society which is not in condition to repel aggression from without is wanting in its principal duty to the members of which it is composed, and to the chief end of its institution. All means which do not affect the independence of other nations are lawful to this end. No nation has a right to prescribe to another what these means shall be, or to require any account of her conduct in this respect."[1]

In its exercise of the right of self-preservation a state organizes its land and naval forces in time of peace or war, maintains them at such strength as it may deem adequate to its needs, and protects its coasts, harbors, and land frontiers by such works of defence as it may deem necessary to secure them from attack. The military establishment that is maintained by a particular state is determined by its geographical situation, by its institutions, its military policy, the character of its foreign relations, and to some extent by its financial resources. Any limitation upon such establishments must of necessity be strictly internal in character. External dictation in such matters is ordinarily not permissible. "Armaments suddenly increased to an extraordinary amount," however, "are calculated to alarm other nations, whose liberty they appear to menace. It has been usual, therefore, to require and receive amicable explanations of such warlike preparations; the answer will, of course, much depend upon the tone and spirit of the requisition."[2]

The assertion of the right of self-preservation on the part of a state involves the duty of recognizing the same right in

[1] I Phillimore, §§ 210–220; I Twiss, §§ 106, 108–110; Walker, Manual, § 32; I Halleck, chap. iv. §§ 1–7. 18–27; Pomeroy, §§ 79, 84–87; Wheaton, § 60; Woolsey, §§ 17, 37; I Pradier-Fodéré, §§ 211–235.

[2] I Phillimore, p. 253.

other states. If a state resents invasion of its sovereign rights, it is bound to respect the territory and rights of other states. It cannot invade them itself, nor can it permit its subjects, or others within its jurisdiction, to use its territory as a base of hostile operations against a state with which it is at peace. Its power and responsibility are equal, and it cannot plead its weakness, or the insufficiency of its municipal laws, whenever such hostile attempts originate within its jurisdiction.[1]

The Right of Reputation. This right presents itself in two aspects. 1st. A state is entitled to respect as to its internal affairs. This includes the recognition of its government and institutions, of the methods and agencies by which that government is maintained and administered, and of the officers who compose it, each in his proper function, from highest to lowest. 2d. A state is entitled to respect as an independent body politic, and as a member of the great family of states in which all nations have equal rights. From this point of view a state may be regarded as a moral being, capable of acquiring and enjoying a good reputation; entitled, by right, to immunity from insult or injury to such reputation, and liable to the obligation of respecting the reputation of other states. It is, therefore, its duty to resent insults offered to its moral dignity, to its flag, which is the visible symbol of its majesty and power, and to the ministers or public officials who represent it abroad.[2]

The Enforcement of Treaty Stipulations. Treaties are voluntary engagements entered into by sovereign states, by

[1] Woolsey, § 43; Wheaton, § 63; I Halleck, chap. iv. §§ 1–4; Wildman, pp. 47, 48; Hall, § 88; Dig. Int. Law, §§ 45–68; I Phillimore, § 264. According to the pure spirit of the law of nations, no nation gives herself a claim to call upon other nations for a strict observance of their law who does not observe it strictly upon her own part, not only in the particular class of cases in which she makes the call, but throughout the whole system of that law; for that law presents an entire system of the relative rights and duties of nations, founded throughout on the purest morality and the most expanded philanthropy, and every part of it is equally obligatory on all nations. — Sullivan's case, I Opinions of Attorney-General, p. 509 [511], Wirt (1821).

[2] I Halleck, chap. v. §§ 1–10; Woolsey, §§ 18, 82.

which mutual duties and obligations are created or defined. As they operate to convert *imperfect* into *perfect* rights, the violation of a treaty stipulation may afford just cause for war.[1]

The Duty of a State to Protect its Citizens or Subjects. It is a fundamental maxim of government that every citizen owes a duty of defence to his country in time of public danger. In return, the citizen is entitled to the protection of his government, in person or property, against injury and aggression of every sort. This protection surrounds him at home, and follows him wherever he may travel or reside.

Such injuries may be committed: 1. When a state, through its officers or duly authorized agents, acts directly against the subject of a foreign state, in violation of international law. 2. When a state acts indirectly, by failing to secure adequate remedies to strangers who have been injured by individuals within its jurisdiction.[2] In either case it is the right and duty of the offended state to protect its subjects in foreign parts by every means authorized by international law. It does not follow, however, that every case of aggression of this kind must of necessity result in war. If an individual subject have a cause of complaint against a foreign state, to which that state, upon proper representations, has refused, or neglected, to apply a remedy, he applies for redress to his own government. The case is investigated, and, if the complaint is found to be well grounded, redress is demanded in the diplomatic way. It is only when the cause of complaint is unusually serious, or when redress has been refused or needlessly delayed, that recourse is had to forcible methods in order to obtain justice.[3]

[1] Vattel, liv. ii. chap. xv. §§ 221, 222; I Halleck, chapter viii. § 28; Creasy, §§ 41–43; Klüber, § 145; Bluntschli, § 410.

[2] Heffter, p. 120; Halleck, chap. viii. §§ 28, 29; Grotius, liv. ii. chap. xxv.; Woolsey, § 112; Pomeroy, §§ 204–214; Wheaton, § 32; Snow, pp. 62–65; II Phillimore, §§ 2–9; Hall, § 87; Lawrence, Int. Law, §§ 113–115, 117–118; Bluntschli, § 380.

[3] As a state may be required, in a proper case, to resort to extreme measures—to war, if need be—to protect the persons of its citizens abroad, "so, again, a state may be compromised by the rash, imprudent, or injurious acts of its citizens resident in the territory of foreign states. These may either be private citizens, or may be persons directly representing the state,

In addition to its right to protect its citizens abroad, a state may demand that its citizens, in a particular state, shall be placed upon a footing of equality with other resident foreigners, and may complain if they are unfairly discriminated against by any agent or department of the local government.[1]

Measure of Reparation. When a state finds it necessary to interpose in behalf of a citizen who has been injured abroad, the form and manner of reparation to be demanded will be determined, in accordance with the circumstances of the particular case, by the government of the offended state. The measure of satisfaction which a state may insist upon consists, in general, in a reparation for the injury or wrong committed, the adequate reimbursement of the damage sustained by the party injured, and a reasonable but sufficient guarantee against its recurrence.[2]

Limitations upon the Duty of a State to Afford Extra-Territorial Protection. The duty of a state to protect its citizens abroad is subject, in practice, to two important qualifications; these are: First, Citizens of one country travelling or resident in another are not only subject to the local laws, but are bound to observe them in good faith and in every detail. They are not entitled to the protection of their own government when their conduct has been such as to amount to a violation of such local laws. "It is a perfectly well-understood principle of law that no citizen of a foreign nation—excepting, perhaps, in certain cases, a representative clothed with diplomatic privileges—is free from the obligation of

whether in a civil or military capacity. That a state should be ready to protect every one of its members when travelling abroad under the assurance of that protection, and, when conducting themselves with proper regard to the laws and customs of the people with whom they take up their abode, is a proposition which no one would contest. But the proposition has been too frequently extended, in practice, to signify that, for whatever purpose citizens of one state may sojourn in the territory of another, and however they demean themselves, the so-called 'honor' of their state compels it to interfere in their behalf, even if the result should be war."—Amos, Science of Law, p. 330.

[1] II Dig. Int. Law, §§ 189, 190a; Hall, § 87; Snow, pp. 62–65.

[2] Bluntschli, § 380; Hall, § 87; II Dig. Int. Law, §§ 189–190.

conforming himself to the laws of the country in which he is residing."[1] Second, If an injury be inflicted upon a citizen of one state in the territorial jurisdiction of another, the party injured, before demanding the interposition of his own government, must first resort to, and exhaust, the remedies provided by the authorities of the locality or place in which the injury has been inflicted. It is only when such recourse has been had, without result, that the case will be taken up by the state of which such injured party is a citizen.[2]

It is proper to add, in this connection, that the amount of protection afforded abroad may, or may not, be equal to that afforded at home. This results from the fact that no two states have precisely the same degree of civilization, or are

[1] Mr. Adams's statement of the Geneva case, Creasy, p. 187; II Phillimore, pp. 3, 4; Creasy, § 191; II Dig. Int. Law, § 189; Hall, § 87; Heffter, § 62; Bluntschli, § 388.

[2] A citizen of one nation, wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim or it will not be considered. — United States *vs.* Diekelman, 92 United States, 520, 524. Before a citizen becomes entitled to the aid of his government in obtaining redress for wrongs alleged to have been suffered by him at the hands of a foreign government, he must have first sought redress in vain through the tribunals of the offending government.—XIII Opinions of Attorney-General, p. 547. This rule may be departed from, however, where the offending government, by the acts of its proper organ, relieves the injured party from the obligation of pursuing such remedy.—Ibid. The rule that, before a citizen of a country is entitled to the aid of his government in obtaining redress for wrongs done him by another government, he must have sought redress in vain through the judicial tribunals of that other government, is inapplicable where the offending government, by the acts of its proper organ, relieves the injured party from the obligation of pursuing such course. The passenger-tax of $2 per head, levied by the State of Panama, under authority from New Granada, upon all vessels embarking or disembarking passengers in that state, so far as it affected citizens of the United States crossing the isthmus, is in violation of the thirty-fifth article of the treaty of 1848.—XIII Opinions of Attorney-General, p. 547. By the law of nations, if the citizens of one state do an injury to the citizens of another, the government of the offending subject ought to take every reasonable measure to cause reparation to be made by the offender. But if the offender is subject to the ordinary processes of law, it is believed this principle does not generally extend to oblige the government to make satisfaction, in case of the inability of the offender.—I Ibid. p. 106. See also II Phillimore, pp. 4–7; Hall, § 87; II Dig. Int. Law, § 189, 241–247; Pomeroy, § 205.

able, or willing, to insure precisely the same degree of protection to aliens resident within their territories. If, therefore, an individual ventures into a country where life and property are less secure, or in which there is less respect for law and order, than in his own state, he can only demand from his own government that measure of protection which is afforded to foreigners generally in the state in which he chooses to travel or reside; and it is only when the injury complained of is serious—involving danger to life, or insecurity to property or business—that the government can be expected to interpose in his behalf. A person who voluntarily enters the territory of a state in which the standards of enlightenment are less high than, or different from, those prevailing in his own country, does so of his own free will, and has no valid ground for complaint, so long as his life and property are reasonably secure, and he is placed upon the same footing in respect to protection as other resident foreigners.[1]

The Right of Interference. In international affairs *non-interference* is the rule, *interference* the exception. This follows from the definitions of state sovereignty and independence. The recognition of any other rule would strike at the very foundation of international law, and would render the maintenance of general peace impossible. For this reason the right of interference is denied save in certain extremely exceptional cases, in which the circumstances calling for interference must be of such a character as not only to justify that course, but to render the adoption of any other impossible.[2]

The instances of such interference, in history, are but too frequent. In a vast majority of cases they have not been justified by existing facts, and have led to results in every way more deplorable than those which they were intended to prevent. "The list includes the invasion of Holland by the Prus-

[1] Hall, § 87; II Dig. Int. Law, §§ 189–249; Snow, pp. 62, 63. For assistance in respect to the collection of public debts, see Pomeroy, § 213; Hall, § 87; II Dig. Int. Law, § 231.

[2] I Phillimore, § 392; Pomeroy, §§ 202, 203; Snow, p. 57; I Halleck, chap. iv. §§ 2–13; Woolsey, §§ 43–51; Dana's Wheaton, §§ 63–71.

sians in 1787, to restore to his old prerogatives as stadtholder the Prince of Orange, who was brother-in-law to the Prussian king. It includes the infamous and pernicious attacks on Poland by Austria, Prussia, and Russia, the invasion of France in behalf of Louis XVI. by the Prussians and Austrians in 1791, and the interference of the Holy Alliance with the popularized governments of Spain, Naples, Sicily, and Piedmont, in 1820 and the three following years. The historical student of these transactions will be fully qualified to form a judgment as to whether such proceedings are calculated to promote or to impair the general benefit of the community of nations."[1]

The Duty of Non-Interference. As states are entitled to a complete immunity from interference in their internal concerns, a corresponding duty devolves upon them to refrain from interfering in the internal affairs of other states. This is called the *duty of non-interference.* Save in the cases presently to be discussed, no occasion less urgent than self-preservation, or the infringement of treaty stipulations, can justify such acts of interference.[2]

If the right of interference exists, therefore, as a perfect right at international law, it can be accepted and sanctioned only with important reservations, and can be exercised only in accordance with, and subject to, limitations of the severest character. It may be said to exist, to a qualified extent, in the following cases:

In Self-Defence. A state is not only independent within its own territory, but is entitled to an absolute immunity from external interference, and from acts of hostility or annoyance originating beyond its boundaries, but carried into effect within its territory. An insurrectionary movement within its jurisdiction may be largely supported and maintained by persons residing beyond its borders, and the offending state may be unable or unwilling to lend its aid towards their prevention. In such an event a state is authorized, in the exercise of the

[1] Creasy, p. 289.

[2] Woolsey, § 43; Wheaton, § 63; Snow, p. 57; Pomeroy, § 202; I Halleck, chap. iv. § 2; Hall, §§ 88, 89; Lawrence, International Law, §§ 74–89.

right of self-defence, to invade the territory of the offending state, and secure redress for the injury it has received. To justify such a course, however, the cause of offence must be clear, redress must have been demanded and plainly denied, and the wrong must be of such a character as to render necessary a resort to forcible measures of redress.[1]

Marauding Expeditions. As a consequence of its sovereignty and independence, a state is entitled to an immunity from incursions by expeditions, or marauding parties, whose base of operations is in the territory of another state; when such incursions occur, the injured state will expect, and may demand, a prompt disavowal of the act, with reparation for its consequences, and the punishment of its perpetrators.[2] When the sovereignty of a territory permits it to be made the base of hostilities, by outlaws and savages, against a country with which such sovereign is at peace, the government of the latter country is entitled, as a matter of necessity, to pursue the assailants wherever they may be, and to take such measures as are necessary to put an end to their aggressions.[3]

The Capture of St. Mark's, Florida. In 1818 a body of United States troops, under the command of General Jackson, advanced upon and captured St. Marks, Florida, a post within the territorial jurisdiction of Spain, from which it was alleged that hostile Indians had obtained supplies and ammunition with which to make inroads upon the inhabitants of the State of Georgia. During the invasion two persons, Arbuthnot and Ambrister, who were known to be British subjects, were arrested by Jackson, after hostilities had ceased, and brought before a court-martial charged with aiding and abetting the Creek Indians in war with the United States, and inciting the Indians to war; Arbuthnot was also charged with being a spy. Both were convicted: Arbuthnot was sentenced to be hung, and the sentence was approved and carried into effect by Gen-

[1] I Twiss, §§ 107, 108–110; Walker, Manual, § 32; I Halleck, chap. iv. §§ 18–27; Pomeroy, §§ 79, 84–87; Woolsey, § 43; Wheaton, §§ 62, 63; I Phillimore, §§ 393–398; Hall, §§ 91, 92.

[2] III Dig. Int. Law, § 398; I Ibid. §§ 50–50e.

[3] I Ibid. § 500b.

eral Jackson; the other offender was less severely punished. The British Government refrained from taking any further notice of the affair, at the time, than to institute an inquiry into the facts connected with the punishment of its subjects. The United States Government strongly disapproved of General Jackson's action, and stood ready to disown his proceedings and make reparation for the injury.[1] Somewhat earlier, Amelia Island on the northeast coast of Florida, which had become a place of resort for slavers, freebooters, and smugglers, whose predatory operations had been directed against the people of the State of Georgia, was captured by United States troops, and its inhabitants dispersed, on the ground that the government of Spain was either unable or unwilling to restrain the lawless acts of persons within its territorial jurisdiction. This action was made the subject of an energetic protest on the part of Spain, and gave rise to an extended controversy, which was terminated by the purchase of Florida by the United States in 1819.[2]

Case of the "Caroline." This vessel had been employed by the Canadian insurgents to carry munitions of war and persons taking part in the insurrection from the New York side of the Niagara River to the Canadian side. A Canadian armed force was sent to capture her, expecting to find her in Canadian waters; but, learning that she was on the American side, they went over and destroyed her. In the correspondence which ensued between the governments of Great Britain and the United States Mr. Webster contended that, for such an infringement of territorial rights, the British Government must show "a necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberation"; and it should further appear that the Canadian authorities, in acting under this exigency, "did nothing unreasonable or excessive." Lord Ashburton admitted the correctness of Mr.

[1] Sumner, Life of Jackson, pp. 53–54; I Dig. Int. Law, § 50b; I Benton, Thirty Years in the United States Senate, p. 167; II Amer. State Papers, Misc. p. 801; II Gallatin's Writings, p. 69.

[2] I Dig. Int. Law, § 50a.

Webster's doctrine, contended that the circumstances came up to the statement of it, and "regretted that some explanation and apology for the occurrence were not immediately made." This was accepted by the United States as satisfactory.[1]

In Accordance with Treaty Stipulations. It has been seen that certain questions of strictly internal concern may properly be made the subject of treaty guarantee. Such are the maintenance of a particular government or constitution, the permanent neutrality of a state, or its existence within certain territorial limits. When the particular state of affairs which has been made the subject of guarantee is menaced with change, or when its existence is threatened in any way, by force applied from without, or originating within the guaranteed territory, it becomes the duty of the guarantor to interfere, and to carry into effect the stipulations of the treaty. Interference under such circumstances is both just and legal. It is limited in character and amount by the terms of the treaty which authorizes it, and it becomes unlawful, and must cease, when the cause of danger is removed and the internal affairs of the state have been restored to their normal condition.[2]

To Assist a State in Suppressing an Insurrection or Rebellion. International law is essentially conservative in character. It recognizes an existing state of affairs, and opposes, and is slow to recognize, changes effected by violent and revolutionary methods. Interference in favor of insurgents is

[1] Dana's Wheaton, pp. 526, 527, note; Walker, Manual, Int. Law, pp. 87, 88. In 1842 the existing laws were so amended by Congress as to confer jurisdiction on the Federal courts to make such use of the writ of habeas corpus as would enable the United States Government to perform its international obligations. — I Dig. Int. Law, §§ 21, 50c; III Ibid. § 350.

[2] The United States, in its treaty of 1846 with New Granada, guaranteed the sovereignty of the latter state. In 1885 it was obliged to interfere to assist in the repression of disturbance. England and the United States, by the treaty of 1850, agree to interfere in certain cases in Nicaragua. The United States, by its treaty of 1867, with Nicaragua, is also obliged to interfere when the case exists which is contemplated by the sixteenth article of that instrument. See also Wheaton, §§ 73–75; Pomeroy, § 203; I Halleck, chap. iv. §§ 5–8; I Phillimore, § 399; Heffter, § 45; Lawrence, Int. Law, §§ 77–79, 83; III Dig. Int. Law, §§ 287–297.

never sanctioned, and when undertaken by a state is equivalent to a declaration of war against the state within whose territory the rebellion exists. Not only is armed interference in behalf of insurgents not justifiable, but the furnishing of any assistance, direct or indirect, or even a failure to strictly observe neutral obligations, is a just cause of offence. In cases of interference in behalf of a central government, the initiative cannot be taken by the interfering state. Assistance may only be furnished on the request of the belligerent government, and then only in accordance with the terms of the invitation.[1]

Intervention in Behalf of an Oppressed Population and Against the Government of a State. From the definition of a state it is clear that any interference between a state and its subjects is opposed to the fundamental principle of international law. It should be an event of the rarest occurrence, and would be justified only in cases of the greatest emergency. As a matter of fact, it has occurred but too frequently, and has rarely been warranted by existing circumstances. A rule deduced from the experience of nations would, therefore, express the conditions under which the law of nations had been disregarded and set at defiance, or evaded, rather than obeyed. It is possible, however, for a case to exist in which a part of the people of a state may be so oppressed, or persecuted, as to warrant other states in interfering upon grounds of humanity. Such a case would be likely to occur when a part of the population of a state was of a different race, or religion, from the great majority of their fellow-subjects; the acts of oppression originating in race or religious prejudice. The mere fact that a people belonging to a particular race, or professing a particular religious belief, are placed at some disadvantage by the law or policy of a state, constitutes no valid ground for remonstrance, still less for interference. To justify acts of positive interference one or more of the following conditions must be fulfilled:

[1] Wheaton, §§ 63, 64–73; Woolsey, § 46; I Phillimore, §§ 400, 401, 409–415; Heffter, § 45; Creasy, § 297; Lawrence, Int. Law, § 84; Westlake, pp. 122–125; Vattel, liv. ii. chap. iv. §§ 54–56.

(1.) A remedy for the wrongs complained of must first be sought in the way of protest or remonstrance.

(2.) The oppression or persecution must be so serious in character, and so great in amount, as to incur the condemnation of the civilized world; and the act of interference must be participated in, or sanctioned by, all the states of Christendom.

(3.) The interference must be limited to the application of a remedy to the wrong complained of, and should cease so soon as substantial guarantees are furnished that the wrongful acts will not be repeated.[1]

Interference in Behalf of the Balance of Power. The term *Balance of Power* is applied to a rude equilibrium of political forces, which was established at an early date among the different states of Europe, the preservation of which is sanctioned by their general consent. It originated in an instinctive exercise of the right of self-defence, and its continued existence is rather a matter of policy and expediency than of strict right. It is justified, apart from the considerations of self-preservation that are involved, by the fact that it has powerfully contributed to preserve the general peace of Europe on numerous occasions when that peace has been threatened by the selfish schemes of ambitious states.

Its right to exist cannot be deduced from any principle of international law, unless the state system of Europe be regarded as a kind of alliance or confederation, having for its purpose the maintenance of peace and the prevention of useless and unnecessary wars. It came into being, largely as a matter of necessity, so soon as the great states of Europe began to assume something of their present territorial form, and was developed out of repeated instances of the exercise of the right of self-preservation by those states as they found themselves obliged, from time to time, to impose checks upon the power of ambitious neighbors. The first wars waged in its behalf were those

[1] Heffter, § 45; Woolsey, § 51; I Phillimore, §§ 400, 401, 409–415; Klüber, § 51, note; Creasy, § 308; Lawrence, Int. Law, §§ 79, 80; I Dig. Int. Law, §§ 45, 47a; Mackintosh, Review of the Causes of the Revolution of 1688, chap. x.; Vattel, liv. ii. chap. iv. § 56.

carried on by Francis I. of France, in the first half of the sixteenth century, to resist the dangerous and increasing power of the Emperor Charles V., whose control of the almost unlimited resources of Spain, Germany, and the Netherlands was a constant menace, not only to the peace of Europe, but to the sovereignty and independence of the other European states. From that epoch until 1815, a period of more than two hundred and fifty years, wars were of such frequent occurrence, and were so long continued, as to cause a state of permanent peace to be regarded as a highly desirable, but extremely unlikely, contingency. Whether the greater number of these wars were due to attempts to overthrow or to defend the principle, and whether wars would have been more or less frequent had the principle never been asserted, need not be discussed here.

For the forty years succeeding the Congress of Vienna, in 1815, the peace of Europe was certainly due to a constant and successful observance of the principle—a result in every way memorable as the first instance in which peace had been maintained on the continent of Europe for so long a time since the beginning of modern history. It is as obvious, however, that most of the great wars that have occurred since the Peace of Paris, in 1856, have been due to the non-observance or abuse of the principle.

The maintenance of peace in Europe during the greater part of the first half of the present century was not obtained without corresponding sacrifices. The principle of the balance of power during this period was not simply recognized, or passively acquiesced in, as a desirable fact; on the contrary, it was vigorously asserted, and to a great extent maintained, by an alliance, or concert of action, on the part of the great powers. This organization was conservative in character, and seems to have originated in an agreement of the crowned heads at Paris, in September, 1815, which has become known in history as the Holy Alliance. The concert thus established was maintained and perpetuated by the various congresses which were held during the decade next ensuing. These alliances were

intended, not only to maintain the equilibrium as established at the Congress of Vienna, but to discountenance revolutionary movements, and, by a resort to measures of a repressive and reactionary character, to prevent the general adoption of even desirable constitutional reforms.

At present, owing to the great increase in military strength which has taken place in some of the more powerful states of Europe, and to a corresponding diminution in the importance of other states which were formerly powerful, the existence of the equilibrium is in constant danger, its permanent guarantee is impossible, and the balance is maintained from day to day with great and ever-increasing difficulty.[1]

De Martens' Statement of the Principle of the Balance of Power. "Every state has a natural right to augment its power, not only by the improvement of its internal constitution and the development of its resources, but also by external aggrandizement, provided that the means employed are lawful; that is, that they do not violate the rights of another. Nevertheless, it may so happen that the aggrandizement of a state already powerful, and the preponderance resulting from it, may, sooner or later, endanger the safety and liberty of the neighboring states. In such case there arises a collision of rights which authorizes the latter to oppose by alliances, and even by force of arms, so dangerous an aggrandizement, without the least regard to its lawfulness. This right is still more essential to states which form a general society than to such as are situated at a great distance from each other; and this is the reason why the powers of Europe make it an essential principle of their political system to watch over the balance of power in Europe. It is clear, also, that it is not always the extent of the acquisition that ought to determine the danger. Everything here depends on circumstances. The annihilation

[1] Woolsey, §§ 44–47; Wheaton, §§ 63–66; Pomeroy, § 203; I Halleck, chap. iv. § 9; I Pradier-Fodéré, §§ 267–286; I Phillimore, pref. 2d ed. pp. vii.–xxxii.; Ibid. §§ 402–407. I Twiss, § 112. The term "Balance of Power" came into general use after the Peace of Utrecht in 1713. —I Twiss, § 112. See also vol. xx. Revue de Droit Int. pp. 5–25.

of a state, which at present serves as a counterpoise, may become as dangerous to the general safety of the neighboring states as the immediate aggrandizement of another state."[1]

The subjoined rules are based upon the exhaustive discussion of the subject by Vattel.

(1.) "The mere fact that a state has acquired, and is acquiring, power greatly preponderant over its neighbor, does not *of itself* justify other states in making war upon it for the purpose of reducing its power.

(2.) "Under such circumstances other states are justified in watching the preponderant state with cautious vigilance, and in forming leagues with each other for mutual defence from it.

(3.) "If the preponderant state commits acts of injury against its neighbors, or any of them, or, by the arrogance of its pretensions, the tone of its public despatches and manifestoes, or by any other course of conduct, beyond the mere increase of its strength, it clearly threatens to attack or oppress its neighbors, then other states are justified in combining together and in making war upon it, so as to prevent it from committing disturbance of the general security of the commonwealth of civilized nations, or of the security and independence of any of them."[2]

These are to be accepted, however, with certain limitations·

(1.) The internal development of the resources of a country has never been considered a pretext for such an intervention, nor has its acquisition of colonies or dependencies at a distance from Europe. It seems to be held, with respect to the latter, that distant colonies and dependencies weaken, and always render more vulnerable, the metropolitan state.

(2.) Although the increase of the wealth and population of a country is the most effectual means by which its power can

[1] Creasy, "First Platform of International Law," pp. 279, 280, citing De Martens, §§ 122–124. See also La Théorie de l'Équilibre Européenne, by Ernest Nys, vol. xxv. Revue de Droit Int. pp. 34–58; Westlake, pp. 120–122; Vattel, liv. iii. chap. iii. §§ 42–49.

[2] Creasy, p. 285; Vattel, liv. iii. chap. iii. §§ 42–50; Lawrence, Int. Law, § 85; Dana's Wheaton, §§ 63–68; Klüber, § 42.

be augmented, such an augmentation is too gradual to excite alarm.

(3.) The injustice and mischief of admitting that nations have a right to use force for the express purpose of retarding the civilization and diminishing the prosperity of their inoffensive neighbors are too revolting to allow such a right to be inserted even in the lax code of international law.

(4.) Finally, therefore, interferences to preserve the balance of power have been confined to attempts to prevent a sovereign already powerful from incorporating conquered provinces into his territory, or increasing his territory by marriage or inheritance, or exercising a dictatorial influence over the councils of an independent state.[1]

The Primacy of the Great Powers; the Concert of Europe. In connection with the European balance of power, it is proper to mention at this point another principle of international political action which has come into being largely within the present century. This principle is called the Concert of Europe, and it grew out of a predominance of influence among the principal states of Europe, which has been appropriately called the Primacy of the Great Powers. It has been seen that all sovereign states are, from the point of view of international law, regarded as equal in respect to the number and extent of their respective rights of sovereignty. In point of power and influence, however, it has been seen that they are very far from equal; their influence depending upon their territorial extent, their wealth and population, and the strength of their military and naval establishments. Admitting such preponderance to exist in behalf of the great powers, it follows that, in matters as to which there is identity of interest, or a

[1] Essay by N. W. Senior, on "Interference to Support the Balance of Power," in No. 77 of the *Edinburgh Review*, cited by Creasy, pp. 285, 286. The principle of the European balance of power, as discussed by text writers, no longer stands alone. There is a similar balance among the several states of Europe in respect to their possessions and acquisitions in Asia, Africa, and the islands of the sea, a disturbance of which is as promptly and keenly felt as if it had occurred on the continent of Europe.

substantial agreement in foreign policy, their united authority may be exerted with a view to constrain less powerful states to follow a particular line of conduct; and they may, by the influence which they are able to bring to bear, compel a particular state to do, or refrain from doing, a particular thing: as to refrain from declaring war, or to bring a particular war to a close, upon certain conditions, or even to bring about certain constitutional changes or internal reforms. The leading states of Europe constitute such a primacy, and their agreement upon a particular line of policy is called the Concert of Europe. This concerted action may be exercised, informally through their respective foreign offices, by diplomatic agencies, or, formally, in congresses or conferences, in a manner presently to be described. The establishment of the kingdom of Greece in 1832, the establishment of a Danish prince upon the Greek throne, upon the abdication of King Otho in 1862, the foundation of the kingdom of Belgium in 1839, and the attempts made, at various times within the present century, to obtain constitutional reforms in Turkey, are examples of such concerted action.[1]

Spheres of Influence. The term "spheres of influence" applies to portions of territory lying within certain well-defined boundaries, and occupied by uncivilized races, within each of which the influence of a particular European state is paramount. The practice of establishing spheres of influence, which is of very recent origin, amounts, in fact, to a distribution of uncivilized territory among the principal states of Europe by treaties defining the boundaries of the areas within which their influence shall be supreme. These treaties, in the preparation of which the people of the distributed territory are not consulted, contain stipulations binding the states which are parties to their operation to refrain from extending the influence of one state within the sphere, or territorial area, allotted to another.[2] As against third powers, not parties to

[1] Lawrence, Essays on Modern International Law, second ed. chap. v. pp. 208–234; Westlake, pp. 92–101.

[2] Westlake, pp. 187–189; Lawrence, Int. Law, §§ 95, 101, 103, 104; vol. xx. Revue de Droit Int. pp. 5–35.

the treaty of distribution, these agreements are, of course, inoperative. How extensive the influence exerted in a particular case shall be, the form and manner of its exercise, whether by the state itself, acting through recognized governmental agencies, or by the interposition of commercial companies, and the question whether it shall ripen into a protectorate, or become a dependency of the predominant state, are matters which are left to the determination of the state whose influence is predominant in a particular territory.

The Monroe Doctrine

The political principle which has become generally known as the Monroe Doctrine has never been regarded, or even suggested, as a rule of international law. Like the principle of the European Balance of Power, however, it concerns more than a single state in its operation and has been made the subject of diplomatic intercourse, and is, for that reason, entitled to a place in a work professing to treat of the relations of sovereign states and of their intercourse with each other.[1]

During the period of the Napoleonic wars, Spain was deeply engaged in European affairs and her dependencies in America took this occasion to assert their independence, which was accomplished, in most cases, without serious resistance on the part of the mother-country. After a proper time had elapsed in each case the United States recognized their independence, and, although Spain continued to regard them as dependencies, it was found to be impossible to reduce them to submission without the assistance of other European powers.

When the Emperor Napoleon was overthrown in 1815, the sovereigns of Russia, Austria, and Prussia entered into a league at Paris, called the Holy Alliance, to which France became a party at the Congress of Aix-la-Chapelle in 1818. England,

[1] The Monroe Doctrine has for its objects the maintenance of peace on the western continent and the preservation of the American states in their integrity. In this respect it bears a relation to the states of America in some respects resembling that borne by the principle of the Balance of Power to the states of Europe, and has the same claim to consideration from the point of view of international law.

although invited to accede to the convention, declined to become a member of the alliance, or to participate in its acts or deliberations.[1] Although the ostensible purpose of the agreement was to secure the subordination of politics to the maxims of Christianity, its real purpose is now known to have been to afford support to European governments in the suppression of revolutionary uprisings and to repress agitation in behalf of liberal reforms. In pursuance of this purpose a reactionary government was established in Naples; somewhat later it supported France in an armed intervention in Spain, as a result of which a republican government which had been established there was overthrown and the absolute government restored to power. It was then proposed to overthrow the republican institutions which had been established in the Spanish American states and to restore them to their former position as European dependencies. This policy was strongly opposed by Great Britain who declared "that she would consider any intervention, by force or menace, in the affairs of these states, as a reason for recognizing them without delay."[2] The English prime-minister, Mr. Canning, brought the matter to the attention of the United States Government, and suggested that suitable steps be taken to prevent such intervention in American affairs.

After consulting Jefferson, Madison, John Quincy Adams, and other leading statesmen of the time, President Monroe embodied the following statements in his annual message to Congress in December, 1823: "The occasion has been judged proper for asserting as a principle, in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintained, are not to be considered as subjects for future colonization by any European power."[3] Else-

[1] For the text of this agreement, see Alison's Life of Lord Castlereagh, vol. iii. p. 66; see also Lawrence, Essays on Modern International Law, second ed. p. 215, note.

[2] I Phillimore, § 405; Dana's Wheaton, § 67, note 36; Woolsey, §§ 46-48; Creasy, § 124.

[3] I Dig. Int. Law, § 57; Rush, I Residence at the Court of London.

where in the same message he states: "We owe it therefore to candor and to the amicable relations existing between the United States and these powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies and dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have on great consideration and just principles acknowledged, we could not view any interposition for the purpose of oppressing them, or in any other manner controlling their destiny, than as a manifestation of an unfriendly disposition towards the United States."[1]

These declarations, which have become known as the "Monroe Doctrine," have never received express legislative sanction, and, therefore, do not constitute a part of the municipal law of the United States. Nor, in a similar sense, are they rules of international law.[2] They have been frequently cited, however, by the Executive, as an expression of the permanent foreign policy of the United States, and have received the support of the political departments of the government and the approval of the American people.[3]

The declaration in respect to colonization proceeded upon

[1] President Monroe's Message of December 2, 1823, *Annual Register*, lxv.

[2] It should be borne in mind that the declarations known as the Monroe Doctrine have never received the sanction of an act or resolution of Congress, and for that reason form no part of the municipal law of the United States; nor do they have any of that authority which European governments attach to a royal ordinance. They are, in fact, only the declarations of an existing administration of what its own policy would be, and what it thinks should ever be the policy of the country on a subject of paramount and permanent interest; indeed Congress has never been willing to commit the nation to any compact or pledge on the subject, or to any specific declaration of purpose or methods, beyond the general language of the message.—I Dig. Int. Law, § 57.

[3] Woolsey, § 48; Creasy, §§ 125–128; Calvo (ed. 1870), p. 204; Pomeroy, § 57; Wheaton, §§ 67, 68; For. Rel. of the United States, 1882, pp. 271–283, 302–314; vol. xxviii. Revue de Droit International, pp. 301–329, 502–525.

the assumption that every part of the territory upon the American continent formed a part of, or was embraced in, the territorial limits of some then existing state, and that, as a consequence, no territory remained in the western hemisphere which could be made the subject of occupation, or colonization, without invading the territory of a sovereign state. Such an attempt to plant colonies in any portion of the western hemisphere would, therefore, be met and resisted by the state whose territories were invaded, and the European power making the attempt might, or might not, incur the disapprobation, or active opposition, of the United States. The question whether the United States would interfere, or refrain from interference, in a case of attempted colonization, is one which would be determined by that government in accordance with the peculiar circumstances of the case.[1]

The doctrine has never been interpreted to mean, however, that the United States would lend its aid in every case of dispute between a Spanish American republic and a European state. Nor has it been regarded as a dormant treaty of alliance, to come into operation upon the occurrence of war between an American state and a European power, to which the United States is bound to become a party against its judgment, or in opposition to its will; it is only when something in the nature of coercion has been undertaken, when some attempt has been made on the part of a European power "to extend their system to any portion of this hemisphere," or when there has been "interposition for the purpose of oppressing an American republic" that a case calling for interference may be said to arise.

Case of Yucatan. This is illustrated by the case of Yuca-

[1] Two years later, at the suggestion of some of the Spanish American states, a congress was called at Panama to take into consideration the means of carrying the Monroe Doctrine into effect. The United States Government sent two representatives to this congress, but declined to commit itself to any particular line of policy, or to accept, in advance, any conclusions which might be adopted, or favored, by the conference.—See the Panama Congress of 1826, vol. iv. of the Int. Amer. Conf. of 1890.

tan, in 1848. In his annual message to Congress for that year President Polk announced that the sovereignty of Yucatan had been offered to Great Britain, Spain, and the United States, and recommended that steps be taken to prevent the absorption of Yucatan in the dominions of any European power. No action was taken by Congress looking to the adoption of the policy recommended by the Executive, upon the ground, as stated by Mr. Calhoun, that the case was one to which the Monroe Doctrine did not apply.[1]

The French Occupation of Mexico. The most striking application of the doctrine, however, is to be found in the resistance offered by the United States to the project of the Emperor Napoleon III. to place Maximilian, an Austrian prince, upon the throne of Mexico. The constitutional government of President Juarez, which had been established by the people of Mexico, refused, in 1861, to recognize the validity of certain debts, contracted in Europe by an insurrectionary government under Miramon, which had been recognized by certain European powers as the *de facto* government of Mexico. England, France, and Spain, acting in behalf of their subjects, who were creditors of Mexico, agreed to take joint possession of certain Mexican ports, and to collect and apply the revenues to the liquidation of these claims. It was a condition of the undertaking that none of the parties to the agreement should make any acquisitions of territory, or exercise any influence upon the internal affairs of Mexico that was calculated to prejudice the right of the people to choose and constitute freely its form of government.

As soon as the troops landed at Vera Cruz the designs of the French Government became apparent, and England and Spain withdrew. Although the United States was then entering the most critical period of her history, her resources being taxed to their utmost in quelling a rebellion at home, she immediately demanded an explanation of France, and received the assurance that the sole purpose of the invasion was to enforce the settle-

[1] Woolsey, § 48; I Dig. Int. Law, §§ 57, 72.

ment of the just claims of French subjects. In 1863, however, as a consequence of the armed intervention of France, Maximilian was placed upon the throne of Mexico, and was supported in that position by the French army of occupation.

The United States continued to recognize the government of President Juarez, and urged France, in the strongest terms, to withdraw her troops from Mexico, but, by reason of her own war, was unable to insist upon their removal. So soon as peace was restored, however, the United States insisted upon the removal of the French army of occupation, and concentrated a large force of troops on the Rio Grande frontier in support of her demand; as a consequence of such insistence, the French troops were withdrawn from Mexico.[1]

The Venezuelan Boundary. Another illustration of the application of this doctrine is afforded by the recent controversy between Great Britain and Venezuela in respect to a disputed question of boundary between the latter state and British Guiana. The official cause of difference in this case arose more than sixty years ago, and the constant endeavor of Venezuela has been to secure an amicable settlement of the difficulty. Arbitration has been proposed, and the United States has, on several occasions, tendered its good offices, and has urged upon Great Britain the propriety of such a settlement of the controversy, but without result. All attempts to obtain an honorable settlement having failed, Venezuela, in 1887, recalled her minister from London.

Great Britain having subsequently evinced a disposition to enforce her claim to the territory in dispute, correspondence with the British ministry was renewed, and President Cleveland, in his annual message to Congress in 1895, suggested a method by which an amicable settlement of the question could be brought about. This correspondence has resulted in the execution of a treaty between Great Britain and Venezuela by which the question of disputed boundary has been referred to a board of arbitration for settlement.[2]

[1] I Dig. Int. Law, § 58; III Ibid. § 318.

[2] See also the articles by J. B. Moore, in vol. xxviii. Revue de

Imperfect Rights.

Nature and Character. The term "imperfect rights" has already been explained. The distinction between perfect and imperfect rights has chiefly to do with their sanction, or obligatory force, and can be best explained, perhaps, by a comparison with the corresponding provisions of municipal law. A *perfect right*, from the point of view of municipal law, is one which is enforced by the state; either by the imposition of a penalty for its violation, or by withholding its sanction, or approval, of an act which is not in conformity to its terms. *Imperfect* rights, on the other hand, are those prescribed by usage, or sanctioned by considerations of politeness, civility, or good-will, and are enforced, or their observance is made general, by the rules of polite society or the requirements of good breeding. The person and property of the citizen, for example, are protected from assault, injury, or spoliation by the enactment and enforcement of appropriate criminal laws; these, therefore, correspond to perfect rights at international law. The obligation to return a salute, or a social visit, or to give a polite answer to a question, is one for which municipal law fails to provide a sanction; it is a "duty" to return salutes or social visits, but it is a duty which is not enforceable at law; so, too, one who tenders a salute, or makes a social visit, has a "moral claim" to a return of the civility in either case, but he has no cause of action for which the courts of the state will provide a remedy. These last correspond to imperfect rights, or, as they are sometimes properly called, "duties" or "moral claims" at international law.[1]

Droit International, pp. 301–329; and by Th. Barclay, in vol. xxviii. Ibid. pp. 502–525; Foreign Relations U. S. 1895, pp. 542–546, 1480–1491; Ibid. 1896, p. 254.

[1] Vattel classifies state rights into internal and external; the latter into perfect and imperfect rights. "The perfect right is that which is accompanied by the right of compelling those who refuse to fulfil the correspondent obligation. The perfect obligation is that which gives to the opposite party the right of compulsion; the imperfect gives him only a right to ask."—Vattel, prelim. chap. p. lxii. § 17; liv. ii. chap. i.; Woolsey, §§ 22–25; Hall, § 13; Lawrence, Int. Law, § 72; I Halleck, pp. 47, 156.

Imperfect rights are reciprocal in character and are said to rest upon the comity of nations. Although they derive their support from considerations which are rather moral than legal, or political in character, they are none the less obligatory upon states in their intercourse with each other. While, as has been seen, the denial of an imperfect right, or a failure to recognize a moral claim, does not constitute a just cause for war, a state declining to recognize them and to be bound by their requirements in its relations with other states would suffer seriously in reputation as a consequence of such neglect.

The following are some of the more important of these imperfect rights or duties:

(*a.*) **The Duty of Humanity.** A state, in the performance of this duty, has chiefly to do with individuals who are obliged to seek shelter in its territory from acts of hostility or from the perils of the sea. The cases of the crews of wrecked vessels, or those of ships-of-war or merchant vessels seeking refuge from a superior force of the enemy, and of bodies of defenceless troops fleeing across a neutral frontier to escape capture, are illustrations of the performance of this duty.

The duty of humanity, however, is not of exclusive application to individuals. "If a nation is suffering under a famine, all others having a quantity of provisions are bound to relieve its distress, yet without thereby exposing themselves to want."[1] "The like assistance is due whatever be the calamity by which a nation is afflicted. Whole sections of countries are sometimes devastated by floods, and cities and towns destroyed by fires and earthquakes, leaving vast numbers of people destitute of the means of shelter and subsistence. It is, first, the duty of their own government to provide for these wants; but not infrequently the calamity is so great that the government is unable to give its aid to the extent, and within the time required, to render its aid efficacious. In such cases the laws of humanity would impose a duty on others. In many instances of this kind, however, the active charity of individuals and

[1] I Halleck, p. 406; Vattel, liv. ii. chap. i.

communities renders any action on the part of the governments of other states unnecessary. But a government may always stimulate and assist such charity, and by thus reflecting and giving effect to the general feelings of its people, manifest its sympathy and generosity."[1] Of such a character was the assistance rendered by the government of the United States in transporting to India, to Ireland, and to Cuba and Asia Minor the contributions of provisions spontaneously offered by the American people.

(*b.*) **The Right of Asylum.** Every state, as a necessary consequence of its sovereignty and independence, has the right to determine what persons, outside of its own citizenship, shall be permitted to enter its territories either for purposes of residence, or as temporary sojourners.[2] On the other hand, it may be said that no individual, save in a limited number of cases presently to be described, has a right to demand such admission to the territory of a foreign state. The state may admit, or, for reasons of its own, may decline to admit, or may even exclude from its territory, any person or persons whose presence is dangerous to its safety, or prejudicial to its rela-

[1] I Halleck, pp. 406–411; Vattel, liv. ii. chap. i. §§ 3–10; Heffter, § 63.

[2] Hall, § 63; Heffter, §§ 62, 63; Klüber, §§ 79, 80; For. Rel. of the United States, 1879, p. 965; Annuaire, de l'Inst. de Droit Int. 1888, p. 245; vol. xx. Revue de Droit International, p. 498. The policy of the United States in respect to immigration was much more liberal in the early part of its history than it is at present. In recent years, with the rapid increase in population, the tendency has been to restrict immigration in respect to certain classes of persons, for reasons set forth in the statutes imposing the restrictions. The following are examples of such restrictive legislation: The Acts of June 23, 1874 (18 Stat. at Large, 251), and March 3, 1875 (Ibid. 477), prohibit the admission of prostitutes, kidnapped persons, or others brought into the territory of the United States against their will; the Acts of May 6, 1882 (22 Ibid. 58), July 5, 1884 (23 Ibid. 115), September 13, 1888 (25 Ibid. 476), October 1, 1888 (Ibid. 504), May 5, 1892 (27 Ibid. 25), and the Treaty of March 17, 1894 (28 Ibid. 158), prohibit the introduction of Chinese laborers; and the Acts of February 26, 1885 (23 Ibid. 332), March 3, 1891 (26 Ibid. 1084), and March 3, 1893 (27 Ibid. 569), prohibit the admission of contract laborers. Save for the authority conferred by these statutes the Federal government is without power to prevent the admission of aliens, to supervise their movements, or to compel their departure or migration from its territory.

tions with friendly powers. A state may therefore prescribe in its municipal laws what persons or classes of persons may come within its boundaries; it may permit some to become citizens and may deny that privilege to others; it may also prescribe, in a similar manner, what rights of residence or domicile may be acquired by aliens coming within its borders.[1]

Case of Political Refugees. It is the practice of most modern states to receive political offenders and persons exiled from their states of nativity for political reasons. Such asylum is accorded even against the protest of the state from which they have fled, and is maintained, if need be, in disregard of its demand for their extradition, or surrender, but upon condition, however, that the laws and institutions of the state in which such offenders have taken refuge shall be respected, and that its territory shall not be made the base of operations against the peace and safety of a friendly state. It has been seen that such asylum is not demandable as a matter of strict right, nor, if it be abused, can its continuance be made the subject of a similar demand; the mere fact that it has been accorded gives rise to no obligation on the part of the state by which it was conferred.[2]

[1] Hall, §§ 10, 13, 63; Snow, p. 61; Klüber, §§ 79–82; Walker, Manual, § 19; Bluntschli, §§ 381–398; II Dig. Int. Law, § 206.

[2] The Federal Constitution and the laws made in pursuance thereof confer power upon the United States to restrict individual liberty only in the case of a person charged with an offence against the United States, or arrested in pursuance of a request for extradition from a foreign power, made in accordance with treaty stipulations. During the controversy with France in 1798, however, three enactments were passed by Congress authorizing the expulsion of aliens from the territory of the United States. The first (Act of June 18, 1798, I Stat. at Large, p. 566) was an amendment to the naturalization laws and forbade the naturalization of alien enemies and extended the period of residence prior to naturalization to fourteen years. The second (Act of June 25, 1798, I Stat. at Large, p. 571) authorized the President, at his discretion, to order out of the country all such aliens as he might judge dangerous to the peace and safety of the United States. The third (Act of July 6, 1798, I Stat. at Large, p. 577) declared that, in case of war or invasion, all resident aliens, being citizens of the hostile nation, might, upon a proclamation issued at the discretion of the President, be apprehended and secured or removed. None of these statutes was ever called into

Case of Shipwrecked Sailors. In case of shipwreck, or where a public or private vessel is forced by stress of weather to take refuge in the territorial waters of a foreign state, humanity dictates that her passengers and crew shall be hospitably received and cared for until their own state, or its duly authorized consular representatives, can make adequate arrangements for their care and maintenance. In other respects such an entry into the ports of a foreign state is controlled by the same rules as are applied to merchant ships, or to public armed vessels, as the case may be.[1]

In the cases of the *Creole* and the *Maria Luz*, presently to be explained, both of which were compelled to seek refuge in foreign ports, in consequence of a mutiny of slaves or coolies which constituted their cargoes, the contention was made that, where a ship is compelled by the perils of the sea, or by mutiny on board, to take refuge in a foreign port, it shall be allowed to depart in the same condition in which it entered, and that persons brought in in a state of slavery, or involuntary servitude, shall continue to occupy that relation during the stay of the vessel in port and on its departure. This claim has not received such general sanction, however, as to entitle it to consideration as a rule of international law.

Case of the "Creole." This case arose in 1841. The *Creole* was a coasting vessel flying the American flag, which was en-

operation.—Hildreth, History of the United States, vol. v. p. 216; Cooley, Const. Law, pp. 97, 98. For the case of Kossuth, the Hungarian refugee, see I Dig. Int. Law, § 48; see also the chapter entitled "Extradition," and II Dig. Int. Law § 272; Vattel, liv. ii. chap. viii. § 100.

[1] In the case of a compulsory entry into a foreign port, under an overruling necessity, the enforcement of the municipal law of the nation having jurisdiction of that port, to the subversion of the authorities and rights guaranteed by its own country, is not in any respect justifiable. — IV Opinions Att.-Gen. p. 98. If a vessel be compelled, by an overruling necessity, to take refuge in the ports of another country, she is not subject to the municipal laws of that country, so far as concerns any penalty, prohibition, tax, or incapacity, that would otherwise be incurred: Provided, she do nothing further to violate the municipal law during her stay.—VII Ibid. p. 18; Ibid. p. 122; Vattel, liv. ii. chap. viii. § 104; II Halleck, p. 182; Hall, § 63; I Ferguson, §§ 112–114; Bluntschli, §§ 394–398; II Ortolan, chap. viii.

gaged in carrying a cargo of slaves from Hampton Roads to New Orleans, both ports being within the territorial jurisdiction of the United States. While in the prosecution of this voyage, the slaves mutinied, killed one of the owners of the cargo, and compelled the officers of the ship to put in to Nassau, a port of the Bahama Islands. There, in accordance with the practice of the British Government in that regard, the authorities of the port set at liberty all persons on board who had not been concerned in the murder. The surrender of the slaves was demanded by the United States on the ground that, as the action of the captain had been constrained, the entry had been in distress, and that such entrance into a foreign port did not suspend the operation of the laws of the state under whose flag the ship sailed, or affect in any way the status of the persons on board in respect to their legal relations to each other. The British Government sustained the action of its colonial authorities and declined to surrender the slaves, and the claim for them was finally merged in the negotiations which resulted in the extradition treaty of August 9, 1842.[1]

Case of the "Maria Luz." The *Maria Luz*, a vessel flying the Peruvian flag, while carrying a cargo of coolies from Macao to Peru, being in distress, was obliged to put in to the port of Yokohama, Japan. A question having arisen as to the character of the alleged "passengers," an inquiry was instituted by the local authorities, to which nearly all of the coolies constituting the cargo of the vessel were summoned as witnesses. After the inquiry had terminated, the Peruvian captain requested the return of the coolies, which was refused. He was informed, however, that the local courts were open to him for the institution of a suit with a view to compel specific performance of their labor contracts, on the part of the coolies, if any such contracts existed. This trial was had and the decision was adverse to the captain of the *Maria Luz*. Peru having no

[1] I Dig. Int. Law, § 38; II Von Holst, Constitutional History of the United States, p. 479; II Benton's Thirty Years' View, p. 409; Webster's Works, p. 303; Woolsey, § 74; I Phillimore, pp. 364–366, 372, 444; Snow, Cases in Int. Law, p. 136.

consular or diplomatic representatives in Japan at the time, the captain then requested the good offices of the American consul, to assist him in securing possession of the cooly passengers; his request was declined, however, on the ground that the trade in cooly laborers was forbidden by the laws of the United States. This refusal was approved by the American Government. The case was then presented to the government of Japan by the American minister, with the consent of his government, and was finally referred to the Emperor of Russia for arbitration, in pursuance of an agreement to that effect, entered into by the Japanese and Peruvian governments. A decision was rendered by the Emperor Alexander II. on February 29, 1875, to the effect that the Japanese Government had acted in good faith in the matter, and was not responsible for the consequences attending the detention of the ship in the territorial waters of Japan.[1]

(*c.*) **The Duty of Comity.** "There is a set of courteous and convenient observances, usually followed in the conduct of states towards each other, too definite, and often too minute and conventional, to make it proper to call them moral principles. The violation or neglect of these is not considered sufficient in itself to justify war, though one state is, by such violation or neglect, often placed in an attitude of avowed ill-will and suspicion towards another state. These observations of courtesy and convenience are said to depend on what jurists and statesmen style the *comity of nations*."[2] The practice of extradition, the recognition of the principles of private international law, the privileges of exterritoriality extended to foreign sovereigns and ambassadors, to armies in transit, and to public armed vessels, are all based upon the comity of nations.

(*d.*) **The Duty of Intercourse.** In the discussion of this duty it is necessary to regard it from two points of view,

[1] U. S. Foreign Relations, 1873, pp. 524–630; Ibid. 1875, p. 1066.

[2] Creasy, p. 36; I Halleck, pp. 47, 156; Woolsey, §§ 24, 73, 81; Pomeroy, § 132; Hall, § 13; I Twiss, §§ 160–170; I Phillimore, §§ 16, 141–143; Walker, Science of Int. Law, pp. 118–122.

and to consider, 1st. The duty of a state to enter into relations of intercourse with other states; to send and receive ambassadors, to permit consuls to reside and to perform their duties in its commercial cities, to negotiate treaties, and to permit aliens to travel or reside in its territory. 2d. The duty of commercial intercourse, which consists in permitting foreigners to engage in commerce with its subjects, and to exchange its products for those of other nations.

In the former case a nation, by establishing a rule of strict non-intercourse, shuts itself out from being a party to international law. It declines to be bound by its sanctions, and it cannot of right expect other states to observe them in such casual and irregular intercourse as they may have with it. Aliens who enter its territory do so at their peril; and, as its own citizens in foreign parts cannot look to their own government for protection, many of their wrongs must go unredressed. It is not necessary to discuss the subject further, for the reason that no state now assumes, or has ever assumed, such an attitude of complete isolation. It is only necessary to observe, in this connection, that, in proportion as a nation withdraws itself from intercourse with other states, or hampers its international relations with needless and burdensome restrictions, in the same proportion it withdraws itself from the benefits and privileges of international law. If it ceases to sanction, or formally withdraws, privileges which have been granted to other states, or to aliens resident within its territory, or which they have enjoyed with its tacit consent, it is guilty of a violation of comity which will gain for it the ill-will of nations, and, if such a policy be persisted in, may, in the end, result in measures of retaliation.

In respect to the duty of commercial intercourse, it has been contended by some writers that the right to such intercourse is a perfect right, and that a refusal to enter into commercial relations is a just cause for war. Others claim that such intercourse is a perfect right only when an article of commerce is produced by one state which is absolutely necessary to the existence of another. Neither of these views is fairly de-

ducible from the fundamental principles of international law. In the first place, while many articles of trade are highly desirable, none have thus far been shown to be so absolutely necessary and indispensable as to justify a resort to forcible methods to obtain them. Such a view is not to be inferred from the theory of state sovereignty and independence, and a refusal to enter into such relations would certainly not justify acts of hostile interference. "Vattel lays down the general rule that every nation, in virtue of its natural liberty, has a right to trade with those which shall be willing to correspond with such intentions, and to molest her in the exercise of her right is doing her an injury."[1] "The obligation of trading with a foreign state is imperfect in itself, and gives them only an imperfect right, so that, in cases where the commerce would be detrimental, it is entirely void."[2] "China and Japan for a long time declined all commercial intercourse with other nations, and even now permit only a very restricted trade, in particular articles and at particular places. The question was at one time discussed whether these people could not be compelled to open their ports to foreigners, and engage in trade and general intercourse with the rest of the world. But, as a question of international jurisprudence, it scarcely merits consideration. No doubt on this point could arise in the mind of any person except those who contend that the rules of international law adopted by Christian nations are wholly inapplicable to the countries of Asia. But this opinion, although at one time supported by writers of unquestionable ability, is now almost universally rejected by publicists."[3]

The Duty of Mutual Respect—Military and Maritime Ceremonial

Nature and Origin of the Practice. An important class of international usages, largely based upon the principle of the

[1] Vattel, liv. ii. chap. ii. § 24.

[2] I Halleck, p. 404; Vattel, liv. ii. chap. ii. § 25; Woolsey, §§ 25, 63, 64; I De Martens, § 139.

[3] I Halleck, p. 405; Heffter, §§ 33, 193; Klüber, §§ 69–71; I Lorimer, pp. 230–235.

equality of sovereign states, properly falls under the head of imperfect rights, or duties, as their observance is now generally held to rest upon the comity of nations. They are not in themselves matters of paramount importance, or even, in most cases, of serious concern; but their due observance facilitates the amicable intercourse of nations, and their neglect frequently leads to international differences, discussions, and enmities, which have sometimes terminated in long and bloody wars.[1]

A state, in its capacity as a body corporate, has not only a right of reputation, but is entitled to certain external and visible tokens of respect in recognition of its dignity and importance as a member of the great commonwealth of nations. This consideration is also extended to its flag, to its sovereign, or chief executive, and to those persons who represent the state in an official capacity.[2] Within its territorial limits the honors to be paid to its officers are determined largely by custom and tradition; to a certain extent, also, they are recognized and sanctioned in its municipal laws. Without its territorial jurisdiction the question is regulated by the usage of nations, and certain honors which have been received and paid during long periods of time are, by such long-continued usage, recognized as obligatory at international law.

The practice originated in the honors shown to sovereigns in early times, when they represented, to a greater degree than is now the case, the majesty and sovereignty of the states which they ruled by hereditary right, and whose territory they regarded as their own. This early view culminated towards the close of the seventeenth century, when Louis XIV. was at the height of his power, and before the principle of popular sovereignty had begun to make itself felt as a political force in state affairs. During this period there was no surer cause for war than a failure in respect towards a great sovereign or his

[1] I Halleck, p. 107; I Ortolan, chap. xv.; I Twiss, §§ 193–198; Heffter, § 197; Klüber, §§ 89–122; Calvo, §§ 296–345; II Pradier-Fodéré, §§ 546–594; Vattel, liv. ii. chap. iii. § 48.

[2] Vattel, liv. i. chap. xiv. §§ 186–191; II Pradier-Fodéré, §§ 451–455; Wolsey, §§ 18, 82.

representative, and not a few of the many wars waged were caused or prolonged by no better reasons than this. During the eighteenth century the practice began to decline in importance, and merely regal honors began to be less strongly insisted upon, and the power and dignity of the *state itself*, rather than that of its *ruler*, began to be regarded as the real object of honor and respect. Within the present century the general tendency of treaties and usage has been to diminish the number and variety of these ceremonial observances, and to simplify and regulate those which have been retained, or whose continued observance is deemed necessary or desirable.[1]

Present Practice. The observance of these forms is now held to be obligatory in the following cases:

(1.) In the forms of mutual courtesy. This is shown chiefly in the recognition of an existing form of government, including its sovereign, or executive, and other administrative officials, whose functions are provided for by its constitution and laws. In former times none but monarchies were recognized as having the first rank, and an order of precedence was established among them, based largely upon the rank and titles of their respective sovereigns. Republics were, to some extent, disfavored, and in matters of honor and precedence were relegated to a place of secondary or minor importance. This is no longer the case, however, and all sovereign states are now placed upon a footing of perfect equality in all matters of ceremonial.[2]

(2.) In naval and military ceremonials observed on the high seas, or in the territorial waters of a state, between ships or fleets, between ships in port, and between ships and forts or fortified places.[3]

(3.) In similar observances, on land, between armies, forts,

[1] Halleck, pp. 107–113; I Ortolan, liv. ii. chap. xv. p. 335; Klüber, §§ 115–117; I Twiss, §§ 193–195; Lawrence, Int. Law, §§ 137–140.

[2] I Halleck, chap. v. §§ 1–14; I Phillimore, § 147; Hall, § 13, pp. 16, 62; I De Martens, §§ 126–138.

[3] I Ortolan, pp. 316–332; I Halleck, pp. 107–123; Snow, pp. 70, 71; II Pradier-Fodéré, §§ 549–594.

military and naval officers, and in certain military honors shown sovereigns, or to the higher grades of civil officers in the several departments of government of the state.[1]

(4.) In the formality and ceremonial observed in diplomatic intercourse and interstate correspondence.[2]

A state, as an incident of its sovereignty, may regulate the honors to be paid, within its jurisdiction, to its own flag and officials, and to those of foreign states. It may also prescribe the conduct of its representatives abroad, subject to the limitation that its instructions cannot be carried into effect if they are opposed to, or inconsistent with, the usages or policy of the state within whose jurisdiction it is attempted to exercise them. In accordance with this principle every state prescribes, in its laws or regulations, the forms of respect to be shown to its flag, or to the person in whom its sovereignty is vested, and no greater honors may be shown to a foreign ruler than are thus prescribed to be paid to its own sovereign or chief executive.[3]

At the present time all states are regarded as being equal in right and dignity, and the honors now observed are regarded as due:

(1.) To the state itself, in its sovereign capacity. These consist in certain honors paid to its flag, to its sovereign or chief executive, as the representative of its sovereignty, to its ships-of-war in foreign ports or on the high seas, and to organized detachments of its land-forces when in foreign territory.

(2.) To those persons who represent it abroad in an official capacity. Under this head fall certain honors and marks of respect shown to its ambassadors and consuls in their different grades, and to persons in its civil or military service whose duties are performed in foreign territory, or who appear in such territory in an official character.[4]

[1] I Halleck, pp. 107–123.

[2] Ibid. p. 106; II De Martens, §§ 206–213; II Pradier-Fodéré, §§ 547, 548.

[3] I Ortolan, liv. ii. chap. xv. p. 335; I Halleck, p. 107; I Twiss, § 193.

[4] I Ortolan, liv. ii. chap. xv. p. 335; Klüber, § 120; I Halleck, pp. 107–114; I De Martens, §§ 125–138; Heffter, §§ 194–218.

Maritime Ceremonial. The subject of maritime ceremonial is regulated by usage, and, to a perceptibly increasing extent, at the present time, by treaty and agreement of the maritime powers. Ships-of-war visiting foreign ports have a peculiarly representative character. They are required to pay certain honors to the territorial sovereign and his representatives, and may expect, in return, that equal respect and similar honors shall be shown to the flag under which they sail, and to the state whose commission they bear.

The forms of maritime ceremonial consist in the firing of salutes, in the exchange of visits and other courtesies, and in manning the yards, dressing the ship, and hoisting the flag of the state or person saluted. It was formerly customary, in firing salutes in port, to furl the sails; and a similar practice prevailed of hoisting a particular sail in saluting or returning the salutes of war-ships or fleets at sea. The national flag of a public armed vessel, however, should never be lowered as a token of respect to any foreign state or individual. As an expression of grief it may be lowered to half-mast; it may be dipped in returning a similar salute rendered by a foreign vessel, but in every other case it should be carried in its proper situation at the mast-head during those hours of the day in which its display is required by regulations.[1]

Ceremonial on the High Seas. When two fleets or ships-of-war meet upon the high seas, one of which carries a commodore or flag-officer, courtesy requires that the commanding officer junior in rank shall salute first. The same rule holds with respect to the flag-ships of squadrons; but a single ship, no matter what its rank, meeting a squadron, salutes first.[2]

[1] I Ortolan, liv. ii. chap. xv. pp. 335, 336; I Halleck, p. 114; Queen's Regulations (6th August, 1861), chap. iii. § 7; Heffter, § 197.

[2] I Halleck, p. 114. When a ship of the navy falls in at sea with a friendly foreign ship-of-war flying the flag or pennant of a flag-officer or commodore, she shall exchange salutes with such ship-of-war in the same manner as when meeting similar ships of the United States, as provided for in Articles 87 and 88, except that the salute will be returned gun for gun. In port, if several flag-officers are to be saluted, the salutes shall be fired in the order of their rank; if of the same grade, priority shall be given, first, to the nationality of the port,

These salutes are returned gun for gun. Vessels carrying sovereigns, members of royal families, rulers of states, and ambassadors are to be saluted first. The question of returning salutes of this class is now regulated by an international agreement which will presently be explained.[1]

Merchant vessels of the same or different nations, meeting or passing upon the high seas, usually hoist their national colors, but otherwise do not, as a general rule, salute each other. It is customary, however, for them to ascertain, by hailing or the use of signals, the name, origin, destination, and cargo of passing vessels. This information is noted in the ship's log, and, as a matter of commercial news, is sometimes reported to the port of origin of the vessel hailed.

Ceremonial in Foreign Ports; Salutes. When a public armed vessel enters a port of a foreign nation, where there is a fort or battery or where a ship-of-war of that nation is lying, she is required to salute the flag of the state within whose territorial jurisdiction she has come. This salute consists, usually, of twenty-one guns, and will not be dispensed with unless the commanding officer of the arriving vessel is satisfied that the salute will not be returned. In case two or more ships enter in company, only the one commanded by the senior officer is expected to salute. This is the first salute fired after entering the port, and the ensign of the nation saluted is required to be displayed from the main while it is being fired;[2] it is a compliment to the flag, and is therefore regarded as international rather than personal.

International Agreement as to Salutes. A proposition originating with the British Government has received such general approval and sanction from other maritime powers as to entitle it to acceptance as an international usage. In ac-

and, second, to the length of service of the flag-officers in their respective commands. As between flag-officers of the same grade, the last comer will be saluted first. These salutes shall be fired as soon as possible after the usual boarding visits have been made.—Par. 114 U. S. Navy Regulations of 1896.

[1] I Halleck, p. 114.

[2] See paragraph 113 U. S. Navy Regulations of 1896; see also I Ortolan, liv. ii. chap. xv. pp. 336–338; I Halleck, p. 116.

cordance with its terms the following classification is made of salutes:[1]

1. Salutes to be returned gun for gun:

I. To the national flag upon arrival in a foreign port.

II. To foreign flag-officers and commodores when met at sea or in port.[2]

2. Salutes not to be returned:

I. To a president of a republic, royal personages, or members of royal families, whether on arrival at or departure from a port, or upon visiting ships-of-war.

II. To diplomatic, naval, military, or consular authorities, or to governors, or officers administering a government, whether on arrival at or departure from a port, or when visiting ships-of-war.

III. To foreigners of high distinction on visiting ships-of-war.

IV. Upon occasions of national festivities or anniversaries.

Visits of Ceremony. The following rules, in which the maritime powers generally have concurred, are observed by all naval officers in the interchange of visits with naval and military authorities on shore and with the officers of friendly foreign ships-of-war in all ports of the civilized world:

1. The senior officer in port, whatever may be his rank, will, upon the arrival of a foreign ship-of-war, send an officer on board the arriving vessel to offer the customary courtesies. In case two or more ships of the same nation arrive in company, the visit is made to the senior ship only; this is called the "boarding visit."

2. When such a visit is made to a public armed vessel, an officer shall be sent to return it at once.

[1] Adopted by the United States August 18, 1875; see U. S. Foreign Relations, 1875, part ii. pp. 656, 657; see also paragraphs 133 and 164 U. S. Navy Regulations of 1896.

[2] In port, if several flag-officers are to be saluted, the salutes are fired in the order of their rank; if of the same grade, priority in saluting is given: first, to the nationality of the port, and, second, to the length of service of the several flag-officers in their respective commands. As between flag-officers of the same grade, the last comer salutes first. These salutes are fired as soon as possible after the customary boarding visits have been made. — See paragraph 114 U. S. Navy Regulations of 1896.

3. Within twenty-four hours after his arrival, the flag-officer or other officer in chief command of the arriving ship or ships will visit the flag or other officer in chief command of the foreign ship or ships in port, if the latter be his equal or superior in grade. Such a visit made to a public armed vessel is required to be returned within twenty-four hours.

4. In the cases of officers of different grades, the junior is expected to pay the first visit, the same limits of time being observed as to the visit and its return. Where it is impossible to determine the relative or assimilated rank, as between the authorities on land and the officers afloat, the first visit is usually paid by the officials on shore.[1]

5. Flag-officers return visits of officers of the grade of captain and those of superior grades. It is customary for chiefs of staff to return the calls of commanders or other junior commanding officers.

6. Captains and commanding officers of junior grades will return all visits made to them by commanding officers, whatever their grade.

7. In the case of two or more ships arriving in port, or lying in port when another ship arrives, after the interchange of visits between the senior officers shall have taken place, the captains or other officers in command of the arriving ships-of-war call upon the officers in command of the ships-of-war in port, by whom the visits are returned.[2]

[1] U. S. Navy Regulations (1896), par. 164; I Ortolan, liv. ii. chap. xv. p. 344; I Halleck, chap. v. § 23; I Twiss, § 194; Heffter, § 197.

[2] See pars. 164 and 165 of the United States Navy Regulations of 1896, which contain the following provisions: "Wardroom officers of a ship of the navy arriving in port, shall, after the interchange of the usual visits by their own and other captains, call upon commanding and wardroom officers of other ships-of-war in port, when such visits, in the opinion of their captain, are usual or desirable, and will probably be returned. The officers to make the visits shall be designated by the captain." — Par. 165 U. S. Navy Regulations, 1896. "Visits of ceremony between officers of ships of the navy and those of foreign naval and military stations and between officers of naval stations and those of foreign ships-of-war, shall be governed by the rules laid down in Arts. 164 and 165, so far as officers of the United States Navy are concerned."—Par. 166, Ibid.

Ceremonial on Land. A similar ceremonial is observed on land, between officers in chief command of armies, forts, and military posts, and military or naval officers representing different states, who come into official or personal contact with them in the performance of their official duties. Suitable military and naval honors are paid to foreign sovereigns and ambassadors, and to the higher grades of officials of the diplomatic or military service of a foreign state.[1]

[1] Upon arrival in a foreign port where there are diplomatic or consular officers of the United States, the following rules in regard to visits of ceremony shall be observed by officers of the navy: 1. A flag-officer or commodore shall pay the first visit to a diplomatic officer of or above the rank of chargé d'affaires. He will receive the first visit from consular officers. 2. A commanding officer shall pay the first visit to a diplomatic officer of or above the rank of chargé d'affaires, and to a consul-general. He will receive the first visit from other consular officers. 3. Diplomatic and consular officers in charge of legations or consulates shall be notified of the arrival of the ship in port. 4. The senior officer present, when notified, shall, if necessary, arrange to furnish a suitable boat to enable a diplomatic or consular officer to pay official visits afloat. A commanding officer shall, when notifying these officers of his arrival, offer them a passage to the ship at such time as they may select.—Par. 169 U. S. Navy Regulations of 1896. Flag and commanding officers of the navy shall, in foreign ports, pay such visits to foreign civil, military, naval, diplomatic, consular, and other officials as custom and courtesy may demand.—Par. 170, Ibid. Flag-officers and commodores may expect a return visit in person from foreign governors and other high civil, military, and diplomatic officials. Other commanding officers may expect such return visits to be made by an aid-de-camp or other suitable officer designated for that purpose.—Par. 171, Ibid. The U. S. Army Regulations of 1895 contain the following requirements in respect to visits of ceremony: The interchange of official compliments and visits between foreign military and naval officers and the authorities of a military post is international in character and opens the way to official and social courtesies among the officers. In cases of vessels of war, foreign or otherwise, recently arrived, it is the duty of the post commander to send a suitable officer to offer civilities and assistance. It is expected that this civility will be returned, and that within twenty-four hours thereafter, weather permitting, the officer in chief command of the ship or ships will visit the officer in command of the post or station, should the latter be his equal or superior in grade. This visit will be returned within twenty-four hours. Should the naval officer in command be superior in grade to the officer commanding the post or station the first visit will be paid by the latter.—Par. 421 Army Regulations, 1895. When a military commander officially visits a vessel of war, he will give notice in advance of his intention to do so. He is received at the gangway by

Observance of National Anniversaries.—Vessels of war in foreign ports celebrate their own *fêtes* according to the regulation of their own government. Courtesy also requires them to take part in the national *fêtes* of the place, by joining in public demonstrations of joy or grief. The same mark of respect is shown to vessels of a third power which celebrate *fêtes* in foreign ports. But if such celebrations are of a character to offend or wound the feelings of their own countrymen, or the nation in whose waters they are anchored—as public rejoicing for a victory gained—ships-of-war will remain as silent spectators, or leave the ports, according to the circumstances of the case. In public ceremonies upon land the commandants of vessels or fleets usually land with the officers of their staff, and receive a place of honor according to the hierarchy of rank, precedence being determined by grade, and, if equal, by date of arrival. In case of disputes as to rank, it is proper for the contestants to withdraw, and become mere spectators of the ceremonies.[1]

the commander of the vessel and is accompanied there by the same officer when leaving. The officer who is sent with the customary offer of civilities is met at the gangway of a vessel of war by the officer of the deck, and is presented by the latter to the commander of the vessel.—Par. 422, Ibid. A vessel of war is approached and boarded, by commissioned officers, by the starboard side and gangway. In entering a boat, the junior goes first and other officers follow in order of rank; in leaving a boat, the senior goes first. The latter acknowledges the salutes which are given at the gangway of a naval vessel.—Par. 423, Ibid. Naval vessels fire personal salutes to officers entitled to them when the boats containing them have cleared the ship. It is an acknowledgment of the salute by the officer saluted for his boat to lie on her oars from the first until the last gun and for him to uncover; at the conclusion, to give way. Personal salutes are not returned by military posts.—Par. 424, Ibid.

[1] I Halleck, p. 116. In case of vessels of war of foreign powers at peace with the United States lying in our ports or harbors and celebrating their national festivities, the commander of each fort, battery, or military post may participate in the celebration by firing salutes, parading commands, etc. In such a case the flag of the United States will be hoisted and lowered simultaneously with that of the ship on board of which the celebration occurs. — Par. 425 U. S. Army Regulations of 1895; see, for a similar requirement, paragraphs 175 and 176 U. S. Navy Regulations of 1896. General Orders No. 57 of the War Department, dated March 28, 1899, and published with the concurrence of the Secretary of the Navy, contains the following requirements in respect to the interchange of visits between officers

References. For a discussion of the fundamental, or perfect, rights of states, the student is referred to the following authorities: Hall, "International Law," pp. 45–50; Creasy, "First Platform of International Law," chap. viii.; G. F. De Martens, "Précis du Droit des Gens," liv. iii. chaps. 1–3; liv. iv. chaps. 1–4; I Halleck, chaps. iv.–vii.; Snow, p. 21; Vattel, prel. chapter and chap. iii. §§ 31–48; Woolsey, §§ 36–52. For the rules and forms of international ceremonial, diplomatic, naval, and military, see I Halleck, chap. v. §§ 15–29; I Ortolan, "Diplomatie de la Mer," chap. xv.; I G. F. De Martens, liv. iv. §§ 126–138, 158–163; II Ibid. §§ 175–184; Heffter, liv. iii. chaps. i. and ii.; Vattel, liv. ii. chap. iii. and the naval and military regulations of various states. The subject of "Imperfect Rights" is treated by Creasy, §§ 15–23; I Phillimore, pp. 181–183; I Halleck, chap. xiii. §§ 1–25; I G. F. De Martens, liv. iv. §§ 125–151; Vattel, book ii. chaps. i. and ii. Under the head of duties, or moral claims, this subject is quite fully treated by Dr. Woolsey, "International Law," §§ 22–25.

of the navy and the officers having to do with the administration of the islands, or groups of islands, now occupied by the military forces of the United States: "The term governor-general shall be taken to mean an administrative officer under whom officials with the title of governor are acting. The salute of a governor-general shall be seventeen guns. All naval officers in command shall make first visits upon the governor-general whatever the latter's military grade. Officers of the army holding commands under a governor-general, or acting as governors of provinces, departments, or cities, shall make the first visit upon a naval commander-in-chief, if the latter is of equal or superior grade, as shall also civilian governors of provinces, departments, or cities. If not a commander-in-chief, the first visit shall be made by the senior naval officer upon officers of the army holding command under a governor-general or acting as governors of provinces, departments, or cities, if the latter are equal or superior in grade, and upon civilian governors of provinces, departments, or cities. Should the governor-general be a civilian, and therefore not holding direct military command, the naval commander-in-chief shall make the first visit both upon the governor and the army officer in chief command of troops in the island or group of islands, if the latter is of equal or superior grade. Visits should be exchanged under the above rules between a naval commander-in-chief or senior naval officer: (1) With the governor; (2) the governor of a province, department, or city; (3) the army officer in chief command at a place where there is a civil governor. Should the governor-general or any other officer administering the government of an island find that from indisposition or pressure of important business he is unable to pay or return these visits in person, he will depute his aide-de-camp or some other officer to do so. In like manner, should a naval commander-in-chief from indisposition or pressing occupation be precluded from paying or returning these visits, he will depute an officer not below the rank of flag-lieutenant to do so. In each case the officer failing to pay the required visit in person will report the circumstances, and assign the reasons which led to the omission, to the department under which he is acting."—G. O. 57; A. G. O. 1899.

CHAPTER IV

NATIONAL CHARACTER: CITIZENSHIP, NATURALIZATION, EXPATRIATION, DOMICILE

Citizens; Subjects. Although the parties to international law are sovereign states, those states, as we have seen, are composed of individual units, or members, called, variously, citizens or subjects. A *citizen* or *subject* may therefore be defined as an individual member of the body politic, owing it the duty of allegiance and support, and entitled, in return, to its protection as to his person and property.[1] The terms citizen and subject, as used in international law, have precisely the same meaning; they apply to all the inhabitants of a state, of both sexes, and of all ages and conditions, who were born in its allegiance or have acquired the quality of citizenship by natu-

[1] The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by such association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection, and protection for allegiance. For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of government. "Citizen" is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the states upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation and nothing more. — Minor *vs.* Happerset, 21 Wallace, 162; United States *vs.* Cruickshank, 92 United States, 542; the *Pizarro*, 2 Wheaton, 227.

ralization. The term "citizen" is applied in states having republican forms of government; the term "subject" in those having monarchical institutions. The civil and political rights of an individual, in the state of which he is a citizen, are determined by its constitution and laws; without that state his rights are determined, as will presently be seen, by the rules of international law.

It is proper to say, however, in this connection, that it is not an essential condition of citizenship that an individual subject or citizen should have any share in the government of a state. His position at international law is the same in either case. The right of suffrage is strictly municipal in character, and is a privilege granted, or withheld, by a state in accordance with its constitution and laws. In some states it does not exist, in others it is greatly restricted, in none does it extend to all who have the rights and privileges of citizenship.[1]

Extra-Territorial Privileges. In addition to the rights and privileges which they enjoy as citizens of the particular state to which their allegiance is due, these members of the body politic occupy a well-defined status which is recognized by the states into whose territory they may come as travellers or sojourners. In their capacity as citizens of sovereign states they become entitled, while thus travelling or sojourning abroad, to certain rights and privileges which are determined, as to their nature and extent, by the rules of international law.

Citizenship and Domicile. The law of nations, which in this regard is supplemented by the municipal law of most civilized states, ascribes to each individual two legal states or conditions: one of these grows out of his allegiance to the state of which he is a citizen or subject; it is acquired, as has been seen, by birth or naturalization, and constitutes his *polit-*

[1] In the United States, however, the curious anomaly is presented of an alien being able to acquire the right to vote, in many states of the Union, without becoming a citizen of the United States. But such persons would not be regarded elsewhere as citizens of the United States, nor would they become entitled to its protection while travelling abroad.—Lanz *vs.* Randall, 4 Dil. 425; Cooley, Const. Law, pp. 79–80; Morse on Citizenship, §§ 1–28.

ical status; the other is based upon the well-known principle of law that the validity of an act is determined by the law of the state, or locality, in which it occurs or takes place — that is, by the law of the individual's residence, or domicile—and this relation constitutes the *civil* or *legal status* of the individual at international law.[1]

National Character and Domicile, How Determined. It may therefore be said that the political, or national, status of an individual is determined by his *citizenship*, a quality which is itself determined, as will presently be explained, by his birth or naturalization; his civil, or legal, status, which is quite independent of his nationality, or allegiance, depends upon his *domicile*, which may be defined as the place in which he has voluntarily established himself for purposes of residence or business.[2] So long as the individual remains in the state of his birth or naturalization, his citizenship and domicile remain the same; the instant, however, that he leaves the state of his allegiance and passes into the territory of a foreign state, either as a traveller or for residential or business purposes, they become separate. His *citizenship*, unless he becomes naturalized in the new state, remains unaltered, his *domicile*, on the other hand, changes with each change of residence or

[1] Story, Conflict of Laws, 8th ed. pp. 40–57; II Kent's Commentaries, pp. 39–69, note; II Wildman, Int. Law, p. 36–117; IV Phillimore, pp, 42-46; Field, Int. Code, §§ 261, 280–292; Morse on Citizenship, §§ 3–24.

[2] In the leading case of Udny *vs.* Udney (L. R. H. L. § 441), Lord Chancellor Hatherly said: "The question of naturalization and allegiance is distinct from that of domicile" (p. 452). Lord Westbury, in his remarks in the same case, said, "The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions: one, by virtue of which he becomes the subject of a particular country, binding him by the tie of natural allegiance, and which may be called his political status; another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status, or condition, of the individual, and may be quite different from his political status." — United States *vs.* Wong Kim Ark, 169 United States, 649, 656; Cockburn on Nationality, 7; Dicey on the Conflict of Laws, 173–177; the *Charming Betsy*, 2 Cranch, 64, 119; Inglis *vs.* Sailors Snug Harbor, 3 Peters, 99; Boyd's Wheaton, § 151A; King *vs.* Foswell, 3 Ch. D. 520.

business location, and the validity of his acts and business transactions, if, at any subsequent time, their legality be drawn in question, is determined by the law of the state in which they took place.

Classification of Citizens. Citizens or subjects may be either *native born* or *naturalized*. The first is a natural, the second an artificial, state of allegiance. A *native-born citizen* is one born within the territory of a state, and subject to its jurisdiction or allegiance. This condition of allegiance is called the citizenship of birth, or nativity. It adheres through life, unless terminated by expatriation, or by process of law, as by banishment, or by forfeiture of civil rights in punishment for a criminal offence. When the nationality of an individual is drawn in question, his citizenship by birth is generally presumed, and it is incumbent upon him to prove any subsequent change of allegiance. If, however, he has acquired another national character, by undergoing the process of naturalization elsewhere, with the consent of his native state as expressed in its laws and treaties, he is as fully a citizen of the latter state as if he were there native born, and is as fully entitled to its protection.[1]

[1] The term native-born citizen is extremely difficult of definition, for the reason that it is impossible to deduce a uniform rule upon the subject which is observed by all nations. Most modern states, however, follow one of two rules, and determine the nationality of a child, 1. By the nationality of its parents; 2. By the place of its birth. Until the close of the last century the former rule prevailed among most civilized states. Since the beginning of the present century, and by reason of the greater and more frequent movement of individuals from one state to another, and especially to newly-settled countries, the second rule has acquired general recognition. England and the United States claim all persons born within their territory as native-born citizens, whatever may have been the nationality of their parents. Denmark, Portugal, Holland, and Italy follow substantially the same rule, as, with some exceptions, do France, Belgium, Baden, Greece, and Spain. The other states of Europe regard a child as having the citizenship of its parents. The definition stated in the text applies more generally than any other. The Fourteenth Amendment to the Constitution of the United States contains the provision that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." In the case of the

A *naturalized citizen* is one who has relinquished his citizenship of nativity, and has acquired a new allegiance in a state other than that of his birth.

The citizenship of a dependent person is that of his principal or superior. Hence the citizenship of a child is that of his father, if legitimate, of his mother, if illegitimate; of a ward that of his guardian; of a wife that of her husband. Children born on the high seas, or while passing through foreign countries, have the legal nationality of their parents. Citizenship in a state may be renounced by an individual with a view to undergoing the process of naturalization elsewhere. It may also be terminated by process of law, as by sentence of death or exile, which in most states has the effect of destroying civil rights. It may be forfeited by emigration, or by long-continued absence. Once forfeited, it may be resumed, with the consent of the native state, by a compliance with the formalities of its municipal law.

Naturalization. *Naturalization* is that process of municipal law by which an individual effects a change in his national character.[1] Most states that recognize the sanctions of interna-

United States *vs.* Wong Kim Ark (169 U. S. 649), decided by the Supreme Court in March, 1897, it was held that "a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes, at the time of his birth, a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment to the Constitution." Native citizens of Mexico, whatever may be their status from the standpoint of the ethnologist, are eligible to American citizenship, and may be individually naturalized by complying with the provisions of the naturalization laws. *In re* Rodrigues, 81 Fed. Rep. 337. A person born abroad, on board of an American vessel, of parents who are citizens of the United States, and who are, at the time, in the foreign country, not with the design of removing thither, but only having touched there in the course of a voyage which the father has made, as captain of the vessel, is to be regarded as a citizen of the United States.—United States *vs.* Gordon, 5 Blatchford, 18.

[1] Vattel, liv. i. ch. 19, §§ 212–233; Morse on Citizenship, §§ 29–60; Osborn *vs.* Bank of U. S. 9 Wheaton, 738; IX Opin. Att.-Gen. (U. S.), p. 359.

tional law claim and exercise the right of admitting foreigners to their allegiance, and of bestowing upon them the privileges and responsibilities of citizenship. Nearly all of them recognize the right, on the part of their subjects, of renouncing their native allegiance and of acquiring a new citizenship in a foreign state. The process of naturalization consists of two essential parts: 1st. A renunciation of the old allegiance. In some states this is expressly required, in others it is presumed by the act of naturalization. From the nature of the allegiance it is obvious that an individual can maintain the relation to but one state at a time. 2d. A formal assumption of the duties and obligations of citizenship in the new state. This is usually effected by an oath of allegiance. A period of residence is also required as a condition precedent to naturalization.[1]

Collective Naturalization. While the process of naturalization is usually applied to the cases of individuals, a collective naturalization of all the inhabitants is effected when a country or province becomes incorporated in another country; as by conquest, or by cession in accordance with treaty stipulations.[2] In this manner the people brought within the jurisdiction of the Union by the acquisition of Louisiana, Florida, Texas, and portions of Mexico and the island of Porto Rico became citizens of the United States. This method, however, must, from the nature of the case, always be exceptional.[3]

[1] For naturalization laws of the United States, see Sections 2165–2174 Revised Statues; for those of England, see 33 Vict. ch. xiv. May 12, 1870; for France, see Code Civil, liv. i. tit. i. ch. 11; for the naturalization laws of other states of continental Europe, see I Phillimore, pp. 382–386; I Halleck, pp. 351–354; II Dig. Int. Law, § 173.

[2] I Phillimore, pp. 382, 383; Cooley, Constitutional Law, pp. 254, 255.

[3] Cooley Const. Law, p. 254; American Ins. Co. *vs.* Canter, 1 Peters, 541; McKinney *vs.* Saviego, 18 Howard, 235; Jones *vs.* McMasters, 20 Howard, 8; United States *vs.* Repentingy, 5 Wallace, 211; Tobin *vs.* Walkershaw, McAll, 186; XIII Opin. Att.-Gen. 397; I Halleck, pp. 376–390; II Dig. Int. Law, §§ 187, 188. All persons who were citizens of Texas at the date of annexation —viz., December 29, 1845—became citizens of the United States by virtue of the collective naturalization effected by the act of that date. Citizens of Texas thus adopted into the citizenship of the United States classified and described.—XIII Opin. Att.-Gen. p. 397.

In one state citizenship may be acquired with but little effort; in another with extreme difficulty, or not at all. This is a matter of strictly municipal concern, which every state regulates for itself as an incident of its sovereignty. A state may make such rules on the subject of naturalization and expatriation as it deems just, or suited to its policy, the only limitation being that such laws must not project themselves into the jurisdiction of another state, and give rise there to a conflict of allegiance.

Consequences of Naturalization. The following consequences of naturalization are now generally sanctioned by the usage of nations:

(*a.*) The result of the process of naturalization is to effect an entire change in the national character of an individual. He is as fully invested with the rights of citizenship in the new state as if he were there a native-born citizen, and is entitled to the same extra-territorial protection.[1] Such protection can be extended to him in the state of his nativity, however, only as the result of treaty stipulation.

(*b.*) A state, by exercising its right of naturalization in favor of an individual, cannot absolve him from any legal obligations due to his former sovereignty at the time of his emigration; and he is liable to be held to the performance of such obligations should he return, at any time, to the jurisdiction of his native state. To the finality and completeness of the process, therefore, and with a view to the establishment of a status which shall be recognized by both states—that in which citizenship is acquired by naturalization, as well as that in which it has been renounced—treaty stipulations are necessary.[2]

(*c.*) An individual, after having been naturalized in a state, may renounce such citizenship, and may renew his native allegiance, or may form a new tie of citizenship elsewhere. Should he return to his native state and settle there, with the

[1] I Phillimore, pp. 380, 381; I Halleck, pp. 349, 350; Woolsey, § 70.

[2] I Halleck, p. 356; II Dig. Int. Law, § 181; Woolsey, § 70.

intention of remaining, he is usually regarded as having forfeited his acquired allegiance, and his citizenship of nativity is resumed.[1]

(*d.*) The municipal laws of every state enumerate and define the rights and privileges which may be acquired by its naturalized citizens. In no case do such persons acquire all the privileges of native-born citizens. The most usual restrictions apply to the holding of political and military office, the higher grades of which, in most states, can only be filled by native-born citizens. In the United States, whose policy of naturalization is extremely liberal, the offices of President and Vice-President can only be held by native-born citizens.

(*e.*) A naturalized citizen who returns to his native country and takes up his residence there with the intention of remaining, is presumed to have renounced his acquired citizenship. His adopted country, in such an event, is justified in declining to extend its protection to a person who has ceased to perform the duties of citizenship, and who declines to be bound by its obligations.[2]

Naturalization Treaties. As a conflict of jurisdiction might, and probably would, arise, were a naturalized citizen to return to the state of his nativity, after having undergone the process of naturalization elsewhere, and with a view to confer upon naturalized citizens such a status of citizenship as will be calculated to prevent such a conflict from arising, the subjects of naturalization and expatriation have, in recent times, been made the subject of frequent treaty stipulation.[3]

[1] I Halleck, pp. 356, 357; II Dig. Int. Law, § 176; I Ferguson, § 42.

[2] I Halleck, p. 357; II Dig. Int. Law, § 190; I Ferguson, § 42; Foreign Relations of the United States, 1884, pp. 450–451.

[3] This matter becomes important from the point of view of the duty of a state to protect its subjects abroad, when, as in the case of the United States, foreigners have come within its territory and become naturalized, often with a view to return to the country of their nativity with the intention of establishing a permanent domicile there and of enjoying, during such residence, the privileges and immunities of American citizenship. This practice has been prevented, to some extent, by the insertion of a clause in naturalization treaties to the effect that such a return to the state of nativity, accompanied by a continuous residence there for a period of two years, shall operate to forfeit

Naturalization Treaties of the United States. The United States has thus far negotiated eleven naturalization treaties, the first of them with the North German Confederation, in 1868.[1] All of them, except that with Great Britain, stipulate for a five years' period of residence as a condition essential to naturalization. All except two[2] expressly provide that a naturalized citizen returning to his native country shall be held liable to trial for all actions punishable by the laws of his native state, committed prior to his emigration. Nine of them contain the provision that an individual returning to his native country shall, after a residence of two years, be presumed to have renounced his acquired citizenship. The naturalization treaties of the United States have thus far successfully endured the test of practical application. They have been administered in a liberal spirit, and but few cases have arisen under them for which they have not afforded an adequate remedy.

Expatriation. The term expatriation is applied to the process by which the allegiance of an individual to a particular state is terminated. It may be voluntary, the act originating

citizenship. In the case of the states situated, or having possessions in the West Indies, however, it is a practice of native-born citizens to visit the United States and undergo the naturalization process with a view to obtain protection as American citizens after their return to the state of their nativity with an intention of establishing a permanent residence there. In such cases the practice of the United States Government is that, where a citizen removes with his family and property and settles permanently in a foreign country, neither expressing nor manifesting by his acts any intention of returning permanently to the United States, and subsequently demands the protection of the government of the United States against the laws of the country in which he has taken up a residence, it will become the subject of inquiry whether he has voluntarily abandoned his right to such protection.—II Dig. Int. Law, § 171; VIII Opinions of Attorney-General, p. 139; XI Ibid. p. 63; Frelinghuysen to De Pierre, II Dig. Int. Law, § 271, p. 314.

[1] Austria, September 20, 1870. Treaties and Conventions of the United States, p. 37; Baden, July 19, 1868, Ibid. p. 43; Bavaria, May 26, 1888, Ibid. p. 49; Belgium, November 16, 1868, Ibid. p. 66; Denmark, July 20, 1872, Ibid. p. 24; Ecuador, May 6, 1872, Ibid. p. 267; Great Britain, May 13, 1870, and February 23, 1871, Ibid. pp. 470, 476; Hesse, August 1, 1868, Ibid. p. 563; North German Union, February 22, 1868, Ibid. p. 790; Sweden and Norway, May 56, 1869, Ibid. p. 1068; Würtemberg, July 17, 1868, Ibid. p. 1146.

[2] Great Britain and Denmark.

with the individual; or it may result from the operation of law; in the latter case it is called exile, or banishment. The act of voluntary expatriation is, in strictness, an essential incident of the naturalization process; for an individual rarely puts off his citizenship unless with the intention of changing his national character, and this change can only be effected by undergoing the process of naturalization.

The doctrine of indelible allegiance is now either tacitly or expressly abandoned by nearly all states that are parties to international law, and there is very general agreement among them as to the following fundamental principles:[1]

(*a.*) From birth, to the date of emigration, the jurisdiction of the country of nativity is complete. The state of nativity may therefore determine the conditions to be fulfilled by its subjects before emigration, as an incident of its municipal jurisdiction.

(*b.*) The act of emigration cancels no obligation incurred prior to its date.

(*c.*) A citizen, or subject of a state, by undergoing the process of naturalization in a foreign state, is not released from any obligation to the state of his nativity incurred previous to his emigration.[2]

(*d.*) The acceptance by an individual of political or military office in the service of a foreign state, without the consent of

[1] The doctrine of indelible allegiance was one of the settled principles of the English common law, and was maintained in the United States by high authorities during the earlier period of our Federal history. Its assertion by Great Britain, as a basis for the claim to impress native Britons in foreign ships is set forth in the following statement: "No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, divest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the king's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part."—Lord Grenville to Mr. King, March 22, 1797, II American State Papers (For. Rel.), p. 149; II Dig. Int. Law, § 171.

[2] See case of Largomarsini, p. 150. Whether a right of expatriation exists under our Constitution and laws considered. If it does, not only a renunciation of citizenship of the United States, but actual removal, for some lawful purpose, and the acquisition of a domicile elsewhere, are necessary to effect it.—Talbot *vs.* Jansen, 3 Dallas, 133; Jennes *vs.* Landes, 84 Fed. Rep. 73.

his own government, is, in general, equivalent to expatriation. Whether this shall be permanent or not will depend on the municipal law of the individual's state.[1]

While the restrictions which are placed upon emigration by the municipal laws of different states vary considerably, it is still possible to assign each of them to one of two groups. In most of the Continental states of Europe where a system of military conscription prevails, the act of emigration, without permission, involves a forfeiture of civil rights. "Each country hampers expatriation with such restrictions as it thinks fit, and this must probably continue to be the case so long as the present conscription laws are retained."[2] In England and the United States a more liberal policy prevails. In England the subject of expatriation is regulated by the Naturalization Act of 1870, which concedes the right of voluntary expatriation, and regards British subjects as expatriate so soon as they have completed the process of naturalization in a foreign state. In the United States a difference of view existed, for a long time, among the different departments of the Federal government. The view of the judiciary has been that citizenship was a compact between a state and each of its subjects, and that this compact could not be dissolved by the latter without the consent of the former, as expressed in its municipal laws. This view is in substance that maintained by the English courts on the same subject. The view of the political departments of the government has always been that the right of expatriation was an individual right, existing at all times, and capable of being exercised at will. This view they have constantly en-

[1] II Dig. Int. Law, § 176; III Ibid. § 392; the *Santissima Trinidad*, 1 Brockenbrough, 478; Ibid. 7 Wheaton, 283.

[2] Opinion of Mr. Abbot to English Naturalization Commission, United States Foreign Relations, 1873, p. 1248. If a native American can expatriate himself, he divests himself, by the very act of expatriation, as well of the obligations as of the rights of a citizen. He becomes, *ipso facto*, an alien; his lands are escheatable, and the rights appertaining to citizenship, once lost, cannot be recovered by residence, but he must go through the formula prescribed by law for the naturalization of an alien born. — The *Santissima Trinidad*, 1 Brockenbrough, 478.

deavored to incorporate into the conventional law of the United States.[1] In 1868 an Act of Congress was passed declaring that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness."[2] This act, which

[1] Although the right of expatriation was, until quite recent times, generally denied, the great migrations of population from the European states to America, Africa, and the islands of the sea has operated, with other causes, to bring about an important change of view in this respect, and the doctrine of indelible allegiance is now held much less strongly than was formerly the case. The United States has given the individual right of expatriation the express sanction of its municipal law, and it is now generally regarded as established at international law.—II Dig. Int. Law, § 171; the *Santissima Trinidad*, 7 Wheat. 283; Jansen *vs.* the *Vrow Christina Magdalena*, Bee Adm. Rep. 11, 23; VIII Opinions Att.-Gen. p. 139; IX Ibid. p. 62; Ibid. p. 356; XII Ibid. p. 319; IV Phillimore, Int. Law (2d ed.), p. 271. A change of allegiance from one government to another can only be effected by the voluntary action of the subject, complying fully with the naturalization laws, so that there is concurrent action and assent on the part of both the subject and the government to which the new allegiance attaches.—Jennes *vs.* Landes, 84 Fed. Rep. 73.

[2] Act of July 27, 1868 (15 Stat. at Large, 223), § 1999 Revised Statutes; II Dig. Int. Law, §§ 171–179. The declaration in the act of July 27, 1868 (15 Stat. 223; R. S. § 1999), that the right of expatriation is "a natural and inherent right of all people," comprehends our own citizens as well as those of other countries; and where a citizen of the United States emigrates to a foreign country, and there, in the mode provided by its laws, formally renounces his American citizenship, with a view to become a citizen or subject of such country, this should be regarded by our government as an act of expatriation. —XIV Opin. Att.-Gen. 295. The selection and actual enjoyment of a foreign *domicile*, with an intent not to return, would not alone constitute expatriation; but where, in addition thereto, there are other acts done by him which import a renunciation of his former citizenship, and a voluntary assumption of the duties of a citizen of the country of his domicile, these, together with the former, might be treated as presumptively amounting to expatriation, even without proof of naturalization abroad; though the latter is undoubtedly the highest evidence of expatriation.—Ibid. A native-born citizen of the United States, who has been naturalized in a foreign country, and thus became a citizen or subject thereof, is to be regarded as an alien; and he cannot re-acquire American nationality, except in conformity to the laws of the United States providing for the admission of aliens to citizenship therein. — IX Ibid. 356. The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any mu-

is declaratory in character, has only in recent years received judicial interpretation.[1]

The rules of international law in respect to naturalization and expatriation are illustrated by several cases arising in the foreign relations of the United States.

(1.) *Heinrich's Case.* This occurred in 1872. Heinrich was born in the city of New York, in 1850, of Austrian parents who were temporarily resident there. They were never naturalized in the United States, and so, in accordance with the naturalization treaty with Austria, were never citizens of the United States. In 1852 Heinrich returned with his parents to Austria, where for the next twenty years he remained, performing none of the duties of an American citizen, but, on the contrary, enjoying some of the rights and privileges of Austrian citizenship. In 1872 he was notified that he would be held to the performance of his military duties in Austria. To this he

nicipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American Government in his favor would be considered as a justifiable interposition. But his situation is completely changed where, by his own act, he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States—a point not intended to be decided—yet it certainly places him out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance. — Murray *vs.* the Schooner *Charming Betsy*, 2 Cranch, 64 [120]. See also For. Rel. of the U. S. 1878, p. 841; Ibid. 1876, p. 567; Ibid. 1879, p. 973; II Dig. Int. Law, §§ 171–179.

[1] The act of July 27, 1868 (sec. 1999 Revised Statutes of the United States), while controlling as to the subjects to which it relates, represents the political policy of the United States (as distinguished from its judicial policy), in respect to the subject of expatriation, and can have no international or extra-territorial effect. "That act, like any other, is subject to alteration by Congress whenever the public welfare requires it. The right of protection which it confers is limited to citizens of the United States."—Fong Yue Ting *vs.* U. S. 149; U. S. 698, 716. In so far as it was intended to have extra-territorial effect, as a declaration in favor of the individual right of expatriation, such effect has been negatived by the subsequent legislation of Congress having for its purpose the prevention of Chinese immigration, and the exclusion of Chinese subjects from the territorial jurisdiction of the United States.—See Boyd *vs.* Thayer, 143 U. S. 135, 161; Green *vs.* Salas, 31 Fed. Rep. 106; IX Opin. Att.-Gen. 359; X Ibid. 321; XIV Ibid. 295; vol. 18 American Law Review, p. 831; 23 Ibid. 759; II Dig. Int. Law, §§ 171–172a.

demurred, claiming the interposition of the American minister in his behalf, upon the ground that he was an American citizen. According to the several municipal laws of the interested states he was a native-born citizen—of the United States because born in its territory; of Austria because of his Austrian parentage. After some correspondence the United States Government declined to interfere in his behalf on the ground that he had expatriated himself: 1st. By his long residence in Austria, by which he created the presumption that he intended to reside there permanently; 2d. By his having signified his willingness to become an Austrian subject, by obtaining passports and travelling under them in that character.

(2.) *Case of Martin Koszta.*—Koszta was a Hungarian, and so a native-born citizen of Austria. He was concerned in the revolutionary outbreak of 1848, and at the unsuccessful termination of that movement effected his escape to Turkey, where he was arrested and imprisoned, but finally released on condition that he should quit Turkish territory. He went to the United States, took up a residence there, and at the proper time made a declaration, in due form, of his intention to become an American citizen. In 1853, and so before the naturalization process had been completed in his case, he went to Smyrna on business, and was there granted a travelling pass by the United States consul. This paper conferred upon him, to a certain extent, the national character of an American, and stated that he was entitled to American protection. Not long after his arrival in Smyrna his presence was made known to the Austrian consul, and, on June 21, 1853, Koszta was seized by certain persons in the pay of the Austrian consulate, and taken out into the harbor in a boat. At some distance from the shore he was thrown into the water, and was picked up by boats from the Austrian man-of-war *Hussar*. He was taken on board that ship and was there confined with a view to his ultimate conveyance within Austrian jurisdiction.[1]

[1] Foreign Relations of the United States, 1873, part 2, p. 1298; II Dig. Int. Law, §§ 175, 198; Lawrence's Wheaton, pp. 176, 229, 929; Hall, p. 237; Snow's Cases, Int. Law, p. 226; Cockburn, Nationality, p. 118; Dana's Wheaton, § 86, note 49.

The United States consul at Smyrna protested against this arbitrary action, but without avail, and, as a last resort, reported the circumstance to the American Legation at Constantinople. The *St. Louis*, a public armed vessel of the United States, commanded by Captain Ingraham, happened to be lying in the harbor of Constantinople at the time, and Captain Ingraham was requested by the *chargé d'affaires* to proceed to Smyrna and demand Koszta's release, if necessary by a resort to force. In compliance with these instructions Captain Ingraham went to Smyrna and demanded the surrender of Koszta, stating that unless he were delivered up he should take him by force of arms. As such a conflict, aside from its international consequences, would have led to the certain destruction of much of the shipping in the harbor, and to the possible destruction of the town itself, the French consul offered his mediation, and Koszta was delivered into his custody pending the result of the negotiations in his case. As a result Koszta was conveyed back to the United States, the Austrian government reserving the right to proceed against him should he ever return to Turkish territory.

This case has been frequently cited as illustrating many phases of the question of citizenship and allegiance. The following are the more important considerations involved:

(*a.*) The papers in Koszta's possession gave him the character of an American citizen in so far as the Turkish Government was concerned, and entitled him to its protection. If he were not entitled to those papers, the question resulting was one for decision between Turkey and the United States.

(*b.*) The action of the Austrian consul was a gross violation of the sovereignty of Turkey, and a serious infraction of the rules of international law.

(*c.*) The use of force by Captain Ingraham to secure the release of Koszta was also without warrant of international law. It differed from that of the Austrian officials only in that its effects were to vindicate the sovereignty of Turkey. Upon this ground it was defended at the time, and generally justified.

(*d.*) Koszta was not an American citizen. His declaration

of intention to become one, however, entitled him to a qualified amount of protection on the part of the United States; especially in a state where he had the character of an alien, pure and simple, and where the question of his partially acquired allegiance was not complicated by considerations arising out of his allegiance of nativity.

(*e.*) Had his case been drawn in question by any disinterested power, Koszta would have been regarded as an Austrian subject. This would have resulted from the application of the rule of nativity to his case.

(*f.*) If a formal decree or sentence of exile was had against Koszta in Austria, that power could have retained jurisdiction over him to the extent of giving perpetual effect to its decree of banishment, by preventing his return to Austrian territory.

Largomarsini's Case. Largomarsini was born in Italy, of Italian parents, and when two years of age was brought by them to the United States. Upon reaching the proper age, and having fulfilled the usual conditions of residence and intention, he was naturalized in San Francisco, a place which he had chosen as his durable abode. He resided there and elsewhere in California until 1875, when he visited Italy for a temporary purpose, and with the intention of returning to the United States and of resuming his residence there at the end of a year. A few days after his arrival in Italy he was notified that he had been drafted into the military service. Claiming to be a citizen of the United States, he refused to obey the summons, and upon this refusal he was arrested as a deserter from the Italian military service. His case was appealed to the highest military tribunal, where the charge of desertion was not sustained, but he was held to the performance of his military service. Intervention was made in his behalf by the United States minister, but without avail, the refusal to release him being based upon the ground that he was an Italian subject, and that his naturalization in the United States had no effect upon his individual status when he returned to Italy.[1]

[1] For. Rel. of the United States, 1878, pp. 458–464; Ibid. 1879, p. 600.

Case of Ungar. Leopold Ungar was born in Bavaria, but emigrated to the United States, where he completed the naturalization process in 1856. In 1857 he obtained a passport from the Department of State and returned to Europe, passing and repassing several times between the two countries. The last *visé* of his passport bore the date of 1861. In 1873 he arrived in Egypt from Italy, under an assumed name, and was arrested at the instance of the Prussian consul in Alexandria, with a view to his extradition for a crime committed in Cologne. He claimed to be an American citizen, but protection was denied him. 1. Because he had expatriated himself; this was proven by long absence from the United States with no intention of returning. 2. Because he had voluntarily subjected himself to Prussian jurisdiction by committing a crime within Prussian territory. His flight to Egypt in no way affected the question of his national character, as he was subject to the extradition process in Egypt, on the demand of Prussia, in accordance with the terms of an existing treaty of extradition between the two countries.

ALIENS AND DOMICILE.

Aliens. The term *alien* is applied to any person within the territory of a state, at any time, who is not a citizen or subject of that state, either by birth or naturalization. These foreigners or strangers are susceptible of classification into,

(*a.*) *Aliens*, or *Aliens Proper*, including all those persons who are sojourning temporarily within the state, or who are passing through its territory.

(*b.*) *Domiciled Strangers*, including all those persons who have acquired a legal domicile at some place within its territorial jurisdiction.

The peculiar view of allegiance which prevailed during the feudal period survived the downfall of the system in which it had originated, and, in the form of the doctrine of indelible allegiance, became part of the internal political policy of most European states. An individual, born a subject, always retained that character. Such personal and property rights as he was

permitted to enjoy grew out of the fact of his allegiance to his native sovereign, and were not recognized beyond that sovereign's territories. The result was to make the lot of an alien a particularly hard one in early times. So soon as he passed the frontier, and entered the territory of another state, he was regarded as being without rights. Such privileges of residence and occupation as he enjoyed were held upon sufferance only, and could be withdrawn or cancelled at the pleasure of the sovereign in whose territory he was resident. If he died in a foreign country his property, both real and personal, was forfeited to the sovereign in accordance with the *droit d'aubaine;*[1] or, at a later period, when more humane usages had begun to prevail, was heavily taxed when withdrawn from the territory, in accordance with the *droit de détraction.*[2]

As civilization increased, and as commerce and interstate intercourse became general, these harsh provisions were gradually relaxed, though they did not finally disappear until the beginning of the present century. Other restrictions remained, however, notably a disability in the matter of holding land, and "it is only of late years that the right of holding lands on the same conditions as subjects has been conceded to foreigners by most countries."[3] In the matter of holding and transferring

[1] I De Martens, § 90; Klüber, §§ 82, 135; Dana's Wheaton, § 82.

[2] I De Martens, § 90; Klüber, § 63; Dana's Wheaton, § 82.

[3] Boyd's Wheaton, p. 112: "In Belgium this was effected by the law of the 27th of April, 1865.[a] Russia conceded the privilege in 1860.[b] Some of the Swiss cantons do not even now permit foreigners to hold real property without the express sanction of the cantonal government, unless there be a treaty to that effect.[c] Austria,[d] the Netherlands,[e] and Sweden[f] only accord the right on condition of reciprocity in the foreigner's country. The constitution of the German empire provides that every person belonging to one of the confederated states is to be treated in every other as a born native, and to be permitted to acquire real estate.[g] But, as regards other countries, the laws of Bavaria, Prussia, Saxony, and Würtemberg exact for their own subjects, when abroad, the same rights they extend to foreigners in their own dominions.[h]

[a] Report of (English) Naturalization Commission, 1869, p. 115. [b] Ibid. p. 128. [c] Ibid. p. 131. [d] Civil Code of Austria, § 33. [e] Civil Code of the Netherlands, §§ 884–957. [f] Swedish Statute of Inheritance, chap. xv. § 2. [g] Hertslet, Map of Europe by Treaty, art. iii. vol. iii. p. 1931. [h] Report of (English) Naturalization Commission,

personal property, the practice of nations has been much more liberal. This difference of view in regard to the two kinds of property was due in part to the fact that, in early times, only land and immovables were recognized as having the quality of property, and in part to the fact that personal property, especially in the form of money and valuables, could be easily concealed and withdrawn from the operation of the law. The result was that personal property began to be made the subject of legal regulation at a much later date, and when more enlightened views had begun to prevail upon the subject of ownership and property regulation.[1]

Treatment of Aliens. From the principle that all persons within the territory of a state, at any time, are subject to, and are protected by, its municipal laws, it follows that aliens, so long as they obey those laws, will be as fully protected by them as are the citizens of the state in which they are resident.[2] They are subject to some restrictions, however, from

In Italy, Denmark, and Greece[i] aliens are under no disabilities in this respect. The ownership of land in the United States is regulated by the laws of the individual states of the Union. Some states impose no restrictions on foreigners; others require residence and an oath of allegiance; in others a declaration of an intention to become a naturalized citizen of the United States is necessary."[j] "Feudal principles were maintained so long in England that, until the year 1870, an alien was incapable of holding land for more than twenty-one years; that is, he could not purchase a freehold. This, however, was remedied by the Naturalization Act of 1870,[k] which relieved aliens of most of their disabilities, and, as regards land, placed them on the same footing as subjects."—Boyd's Wheaton, p. 113.

[1] Amos, Science of Law, p. 164.

[2] Aliens domiciled in the United States owe a local and temporary allegiance to the Government of the United States; they are bound to obey all the laws of the country, not immediately relating to citizenship, during their residence, and are equally amenable with citizens for any infraction of those laws. Those aliens who, being domiciled in the country prior to the rebellion, gave aid and comfort to the rebellion, were, therefore, subject to be prosecuted for violation of the laws of the United States against treason and for giving aid and comfort to the rebellion.—Carlisle *vs.* United States, 16 Wallace, 147. It is the duty of the President, to whom the care of our foreign relations is committed, to take all law-

1869, pp. 114, 124, 129, 138. [i] Ibid. p. 116; Italian Civil Code, art. iii.; Civil Code of Greece, art. v. [j] Report of (English) Naturalization Commission, 1869, p. 131. [k] 33 and 34 Victoria, chap. xiv. § 2. See also For. Rel. U. S. 1884, pp. 174–187; 1890, pp. 276–280.

which citizens are exempt; and, on the other hand, are not held to the performance of certain duties to which citizens are liable from the fact of their allegiance. The most important of these is an exemption from personal imposts[1] and from obligatory military service—a duty, from its nature, incumbent upon citizens alone.[2]

ful measures for the protection of alien subjects of a state with which the United States are at peace, who shall have come within our territory and placed themselves under the safeguard of our laws with the consent of the general and state governments.—III Opinions of Attorney-General, p. 253. But where aliens have suffered violence from citizens of the United States, they can be protected only by the redress to be afforded in the courts and the special interposition of the legislature.—Ibid. The state courts only have jurisdiction of the criminal offence in such cases; the circuit courts of the United States of a civil action, where the offenders are citizens.—Ibid.

[1] The term *impost*, as here used, refers to impositions of personal service, as for jury duty, etc., and to impositions of money in the way of poll-taxes, or other levies upon citizens alone.

[2] "During the American Civil War the protection of England was frequently demanded by British subjects against conscription in the United States Army. Lord Lyons was instructed that there is no rule or principal of international law which prohibits the government of any country from requiring aliens resident within its territories to serve in the *militia* or *police* of the country, or to contribute to the support of such establishments.[a] But her Majesty's government would not consent to British subjects being compelled to serve in the armies of either party where, besides the ordinary incidents of battle, they would be exposed to be treated as rebels or traitors in a quarrel in which, as aliens, they had no concern, and on their return to England would incur the penalties imposed on British subjects for having taken part in the war.[b] All who could prove their British nationality were, accordingly, exempted from military service.[c] But if a British subject had become naturalized in America, England refused to protect him so long as he remained there.[d] Individuals who had declared their intention of becoming naturalized, but had not completed the necessary formalities, were also treated as aliens, and exempted;[e] but her Majesty's government declined to interfere in their behalf if they had voted at elections, or in any way exercised any of the exclusive privileges of a citizen.[f] In 1863 an Act of Congress was passed specially including 'intended' citizens in a further enrolment of the militia;[g] and a proclamation of the President allowed sixty-five days to such persons to leave the country, or become liable to be enrolled by remaining. To this Great Britain

[a] Despatch to Lord Lyons, No. 76, April 4, 1861. [b] Ibid. No. 349, October 7, 1861: Parliamentary Papers, North America, 1864, No. 13, p. 34. [c] Despatch to Lord Lyons, No. 379, July 29, 1861. [d] Ibid. No. 259, June 7, 1862. [e] Mr. Seward to Mr. Stuart, August 20, 1862. [f] Consular Circular from Mr. Stuart, No. 99, July 25, 1862. [g] United States Statutes at Large, vol.

In states where a military establishment is maintained by a system of voluntary enlistments, few restrictions are placed upon the admission of aliens to the military or naval service. By such an act, however, and during the period of such service, an alien forfeits the protection of his own government, and must look for protection to the state under whose flag he serves. In nearly all states aliens are debarred from holding public office of a political character, and are denied the right of suffrage, when that right exists. Some states still place them under special disabilities in the matter of holding land, or engaging in business, or following certain trades or professions; others make this conditional upon reciprocity.[1] In nearly

acquiesced, the period allowed for departure being deemed sufficient.[h] It was regarded as an established principle that a government might, by an *ex post facto* law, include in its conscription any persons permanently resident in its territory, provided it allowed them reasonable time and facilities for departure on the promulgation of such a law."[i] In the courts of the United States alien friends are entitled to the same protection in their rights as citizens. Nor are their suits barred by proof that the remedy is not reciprocal.—Tayler *vs.* Carpenter, 3 Story, 458. Aliens in the United States are not liable to militia duty. For treatment of alien enemies by the United States, see §§ 4067–4070 of the Revised Statutes of the United States.

[1] It is clear, by the common law, that an alien can take lands by purchase, though not by descent; or, in other words, he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the year-books, and has been uniformly recognized as sound law from that time. Nor is there any distinction, whether the purchase be by grant or by devise. In either case, the estate vests in the alien, not for his own benefit, but for the benefit of the state; or, in the language of the ancient law, the alien has the capacity to take, but not to hold lands, and they may be seized into the hands of the sovereign. But until the lands are so seized, the alien has complete dominion over the same, . . . and may convey the same to a purchaser. . . . In respect to these general rights and disabilities, there is no admitted difference between alien friends and alien enemies. During war the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. But as to capacity to purchase, no case has been cited in which it has been denied; in the Attorney-General *vs.* Wheeden and Shales, Park. Rep. 267, it was adjudged that a bequest to an alien enemy was good, and, after peace, might be enforced. Indeed, the common law, in these particulars, seems to coincide with the *jus*

xii. p. 731. [h] Despatch to Lord Lyons, No. 485, August 31, 1863. [i] Parliamentary Papers, North America, 1863, No. 13, p. 34; Despatch to Lord Lyons, No. 293, November 27, 1862. Boyd's Wheaton, pp. 209, 210.

all the Continental states of Europe aliens are placed at some disadvantage as regards subjects in instituting or maintaining suits at law, and in testifying in certain cases. They also require a register of aliens to be kept, and, in many instances, claim and exercise the right of expelling them from their territories for cause. Many of these restrictions are reasonable, and, if they are generally known, furnish no ground of complaint to other states whose citizens are subjected to them. In some cases, notably in certain Mohammedan and pagan countries, whose systems of government and law are radically different from those of Christendom, the separate treatment of aliens has been made the subject of treaty stipulation.

DOMICILE

Nature of the Relation. Of all the persons residing in a state at any given time two classes have elsewhere been described — aliens and citizens. Between these extremes is found a large class of persons who are not temporary sojourners, neither have they the quality of citizenship. Their residence is not transient, and they are aliens only in the sense that they are not members of the body politic, owing it the allegiance of defence, and for that reason do not enjoy the rights and political privileges of citizens. These persons are called *domiciled strangers.* While their residence is to some extent permanent, they are unwilling, for reasons of their own,

gentium. — Fairfax's devisee *vs.* Hunter's lessee, 7 Cranch, 603 (619). An alien who becomes naturalized may hold land acquired before his naturalization. A grant by a state to an alien is not void; he may take, though he cannot hold against the state. — Governeur's heirs *vs.* Robertson, 11 Wheaton, 332. Neither the Constitution nor acts of Congress required that aliens should reside abroad to entitle them to sue in the courts of the United States.—Breedlove and Robeson *vs.* Nicolet and Sigg, 7 Peters, 413. In the Chinese Exclusion case (130 United States, 603), it was held by the Supreme Court of the United States that "the Government of the United States, through the action of the legislative department, can exclude aliens from its territory." — Nishimura Ekiu *vs.* United States, 142 United States, 651; Fong Yue Ting *vs.* United States, 149 United States, 698; Lem Moon Sing *vs.* United States, 158 United States, 538, 547. *In re* Moses, 83 Fed. Rep. 995.

to give up their citizenship of nativity; and it is not inconsistent with their peculiar relation that they should cherish a remote intention of returning to their native countries should it ever become desirable to do so.

Definition of Domicile. Domicile may, therefore, be defined as the place which an individual has freely chosen as the centre of his domestic and jural relations, and a *domiciled stranger* is an alien who, for purposes of residence or business, has selected a certain place as his durable abode, with no present intention of removing therefrom.[1]

Distinction between Citizenship and Domicile. There has been some confusion expressed in the works of writers upon the subject as to the precise meaning of the terms *citizenship* and *domicile*. From the definition given it will be seen that they are not synonymous; indeed, in strictness, they have no possible connection with each other. The *citizen* is a creature of the municipal law of a state, with which other states ordinarily have no concern. The *rules of domicile* determine the status of an individual from the standpoint of international law, and have no necessary connection with citizenship. *Domicile* is a fact, and, when the domicile of an individual is drawn in question, is proved, like other facts, by evidence as to residence or intention. *Citizenship* results from birth, or the operation of law, and is acquired by undergoing a legal process, the various steps of which are regulated by the

[1] It is remarkable that no definition of the term "domicile" has as yet been universally accepted. It has been defined as "a residence at a particular place accompanied by positive or presumptive proof of an intention to remain there for an unlimited time." This definition is approved by Phillimore in his work on the subject. By the term "domicile," in its ordinary acceptation, is meant the place where a person lives and has his home.—Boyd's Wheaton, § 151B; Twiss, Law of Nations in Peace, pp. 275–277; IV Phillimore, pp. 32–46; I Halleck, p. 361; II Wildman, pp. 36, 37; Woolsey, § 71; Glenn, p. 233; Risley, Law of War, pp. 94, 95; I Lorimer, Institutes, pp. 426–435; Hall, pp. 239, 279, 498, 500; Vattel, liv. i. chap. xix. § 218; Dicey, pp. 1, 3; Story, Conflict of Laws, 41; Bruce *vs.* Bruce, 2 Bosanquet and Puller, 28, note; Bampde *vs.* Johnson, 3 Vesey, 201; Stanley *vs.* Bernes, 3 Hagard Ecc. Rep. 374, 437; Best on Presumptions, p. 235; Mitchell *vs.* United States, 21 Wallace, 350.

municipal law of a state. It is, moreover, a matter of legal record, and, when the citizenship of an individual is questioned, it is established by the production of a duly authenticated certificate of origin, or naturalization.[1]

Rules of Domicile. The rules of domicile, in so far as they are recognized and sanctioned by international law, must, like all its rules, be based upon the general consent of nations. A state may, by its municipal laws, grant certain privileges to domiciled strangers, but those privileges are local in character, not international, and can have no effect beyond the territorial jurisdiction of the state granting them. In a similar way several states may arrange, by treaty, to secure for their subjects special privileges as to domicile in each other's territories, or may obtain for them special exemptions from the operation of certain municipal laws. These privileges and exemptions, however, are restricted in their operation to the territorial limits of the states that participate in the treaty. It is held by some authorities that an individual may also have a domicile in several places at the same time;[2] an opposite rule, however, prevails as to citizenship, and an individual, in his character as a citizen or subject, can owe allegiance to but one state at the same time.

(*a.*) To constitute domicile there must be actual residence, with the intention of remaining. This intention is inferred from the acts of an individual. If he hires or purchases a place of residence, enters into business relations, makes contracts which will require considerable time for their execution, or does any acts of a similar character which are susceptible of being proved by the testimony of witnesses, a court will deduce from such evidence the intention of remaining which constitutes domicile.[3]

[1] Lawrence, Int. Law, § 117; Hall, §§ 72, 87; I Twiss, § 171; I Ferguson, §§ 39, 40.

[2] IV Phillimore, pp. 47–53; Digest, liv. l. tit. i. § 5; Domat, liv. i. tit. xvi. § 56; Duranton, Cours de Droit Français, liv. i. tit. iii. § 357; but see Dicey on Domicile, pp. 61–66; Lawrence, Int. Law, § 117.

[3] Dicey, pp. 119–147; IV Phillimore, pp. 151–204; I Halleck, pp. 362–390; Boyd's Wheaton, § 151D. The presumption of law is that the domicile of origin is retained, un-

(*b.*) Domicile must be freely chosen.[1] Constrained residence does not give domicile. By constrained residence is meant any residence not the result of free choice on the part of an individual otherwise capable of free action.[2] The residence of an officer in the military or naval service is of this character,[3] as is that of ambassadors, their secretaries, and the *attachés* of a legation. The domicile of these persons is the same as their citizenship, native or acquired. They undergo no change of domicile, no matter how long they may be absent from home or resident abroad, provided such residence has an official character, and is in obedience to military orders, or is in the exercise of diplomatic functions.[4] The domicile of a person undergoing a sentence of imprisonment, exile, or ban-

less the change is proved, and the burden of proving it is upon him who alleges the change. . . . But what amount of proof is necessary to change a domicile of origin into a *prima facie* domicile of choice? It is residence elsewhere, or where a person lives out of the domicile of origin. That repels the presumption of its continuance, and casts upon him who denies the domicile of choice the burden of disproving it. Where a person lives is taken *prima facie* to be his domicile until other facts establish the contrary. It is difficult to lay down any rule under which every instance of residence could be brought which may make a domicile of choice. But there must be, to constitute it, actual residence in the place, with the intention that it is to be a principal and permanent residence. That intention may be inferred from the circumstances or condition in which a person may be as to the domicile of his origin, or from the seat of his fortune, his family, and pursuits of life. A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown, or inferred from circumstances, that it was for some particular purpose expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling, it does change the domicile. — Ennis *vs.* Smith, 14 Howard, 400, 423. The result is that the place of residence is *prima facie* the domicile, unless there be some motive for that residence not inconsistent with a clearly-established intention to retain a permanent residence in another place.—Ibid.

[1] IV Phillimore, pp. 151–203; I Halleck, pp. 362–390; Dicey, pp. 73–86; Boyd's Wheaton, § 151B, 151F; I Twiss, § 171.

[2] IV Phillimore, pp. 101–142; I Halleck, pp. 368–371; Dicey, pp. 137–147.

[3] IV Phillimore, pp. 101–122; I Halleck, pp. 369–371; Dicey, pp. 137, 139–143; Boyd's Wheaton, § 151E.

[4] IV Phillimore, pp. 101–144; I Halleck, pp. 368–369; Dicey, pp. 137–138; Story, Conflict of Laws, § 47; Wharton, Ibid, §§ 49, 50.

ishment, is not changed by such constrained absence, unless the exile or banishment be in the execution of a life-sentence.[1] As consuls do not enjoy the privilege of exterritoriality, they become domiciled, for most purposes, at the place where they reside in a consular capacity. It is difficult, however, to state a rule of domicile which will be of general application as regards this class of public officers. They are subject to the law of the place where they reside, and the legality of their private acts is determined by the local law. If, in addition, they are subjects of the state in which they are resident consuls, they differ in no respect, as to citizenship or domicile, from other citizens. If, on the contrary, they are citizens of the state which they represent in the consular capacity, their residence is constrained, and their domicile is unchanged.[2]

(*c.*) The domicile of an inferior or subordinate person is that of the legal superior. Hence the domicile of the wife is that of the husband; of a child, that of the father, if legitimate, or of the mother, if illegitimate; of a ward, that of the guardian; of a slave, that of the master; that of a foundling is the country where he is born or found. A change in the domicile of the superior produces a similar change in the domicile of the inferior or dependent person.[3]

(*d.*) Save in the case of the reversion to the domicile of origin, presently to be explained, domicile once acquired is presumed to continue until it is shown to have been changed.[4] Where such change of domicile is alleged the burden of proving it rests upon the person making the allegation.[5] To constitute

[1] IV Phillimore, pp. 131–134; I Halleck, p. 371; Dicey, pp. 129–132; Story, Conflict of Laws, § 47; Field, Int. Code, § 302.

[2] IV Phillimore, pp. 125–130; Dicey, pp. 138–139; Ennis *vs.* Smith, 14 Howard, 400; Field, Int. Code, § 302; I Twiss, § 171.

[3] Dicey on Domicile, pp. 5–7, 96, 97, 104–107; Boyd's Wheaton, § 151C; I Halleck, pp. 362–368; IV Phillimore, pp. 61–100.

[4] Ennis *vs.* Smith, 14 Howard, 400, 423; Desmare *vs.* U. S. 3 Otto, 605; Mitchell *vs.* U. S. 21 Wallace, 352; Somerville *vs.* Somerville, 5 Vesey, 787; Harvard Col. *vs.* Gore, 5 Pickering, 370; Wharton, Conflict of Laws, § 55; Boyd's Wheaton, §§ 151B, 151E; Dicey on Domicile, pp. 3, 8, 66.

[5] Mitchell *vs.* U. S. 21 Wallace, 352; Desmare *vs.* U. S. 3 Otto, 605; Crookenden *vs.* Fuller, 1

the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo;* both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change; there must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains.[1]

(*e.*) Domicile is always presumed. When once the essential conditions of residence and intention have been fulfilled by an individual, and when the facts of such residence have been established by competent testimony, a court is bound to draw the inference that the intention is to acquire domicile. This follows from the rule that every individual is presumed to have a domicile. If his residence in a particular place has been such —in point of character, duration, and intention—as to conform to the conditions already stated, that place becomes his domicile; if he is a mere sojourner in a foreign country, the place of his birth continues to be his domicile.[2]

(*f.*) As domicile may be freely chosen, so may it be relinquished, or changed, at the will of the individual. To effect such a change it is only necessary for him to fulfil, in another place, the legal conditions of domicile as to residence or intention. Domicile follows the changed conditions, and is established as a fact whenever its essential conditions are perfected or complied with in the place of residence.

The rules of domicile are of importance because they largely determine the status of an individual at international law. They are applied, by the courts of all civilized states, in the

Swabey and Tristram, 441; Hodgson *vs.* De Buchesne, 12 More, Privy Council, 288.

[1] Mitchell *vs.* U. S. 21 Wallace, 352; Wharton, Confl. Laws, § 55; Boyd's Wheaton, § 151D; Dicey on Domicile, pp. 3, 4, 66, 74–91; I Halleck, pp. 362–368; Boyd's Wheaton, § 151E.

[2] Desmare *vs.* U. S. 3 Otto, 605; Mitchell *vs.* U. S. 21 Wallace, 350; the *Francis*, 8 Cranch, 335; the *Nereide*, 9 Cranch, 388; the *Dos Hermanos*, 2 Wheaton, 76; The *Friendschaft*, 3 Wheaton, 14; Boyd's Wheaton, § 151 E; IV Phillimore, pp. 145–150, 151–203; I Halleck, pp. 363–368, 374–383; Dicey on Domicile, pp. 8, 9, 86–96.

decision of cases arising in private international law; and they become specially important in time of war, since by them the character of an individual as an enemy or neutral is fixed and determined.[1]

Kinds of Domicile. Three kinds of domicile are recognized by law:[2]

(1.) *Domicile of Origin.* This coincides with citizenship by birth and has already been described.[3] If another domicile

[1] Domicile in the law of prize becomes an important consideration, because every person is to be considered in such proceedings as belonging to that country where he has his domicile, whatever may be his native or adopted country. —The *William Bagaley*, 5 Wallace, 377. The question of enemy or friend depends upon the domicile. —The *Ann Green*, 1 Gallison, 274; the *Joseph*, Ibid. 545; the *Francis*, Ibid. 614 [618]. The property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize, though some of the partners may have a neutral domicile. — The *Cheshire*, 3 Wallace, 231. Neutral friends, or even citizens who remain in the country of the enemy, after the declaration of war, have impressed upon them so much the character of enemies that trading with them becomes illegal, and all property so acquired is liable to confiscation.—The *William Bagaley*, 5 Wallace, 377 [405]. Goods, the property of merchants actually domiciled in the enemy's country at the breaking out of a war, are subject to capture and confiscation as prize.—The *Mary and Susan*, 1 Wheaton, 46.

[2] IV Phillimore, pp. 151–163; I Halleck, p. 362; Dicey on Domicile, pp. 4, 5; Boyd's Wheaton, § 151c.

[3] IV Phillimore, pp. 25–31; Ibid. pp. 58–60, 151–163; I Halleck, pp. 362, 374, 375; Boyd's Wheaton, § 151c. A naturalized citizen who, in time of peace, returns to his native country for the purpose of trade, but with the intention of returning again to his adopted country, continuing in the former a year after the knowledge of the existence of war between the two countries for the purpose of winding up a complicated business, and engaging in no new commercial transactions whatever with the enemy, and actually returning to his adopted country in a little more than a year after his first knowledge of the war, is to be considered as having gained a domicile in his native country, and his goods, captured after the war, liable to condemnation.—The *Frances*, 8 Cranch, 335. Goods, the property of merchants actually domiciled in the enemy's country at the breaking out of war, are subject to capture and confiscation as prize.—The *Mary and Susan*, 1 Wheaton, 46. Where a native citizen of the United States emigrated before a declaration of war to a neutral country, there acquired a domicile, and afterward returned to the United States during the war and re-acquired his native domicile, he became a redintegrated American citizen; and could not afterward, *flagrante bello*, acquire a neutral domicile by again emigrating to his adopted country. —The *Dos Hermanos*, 2 Wheaton, 76. The native character does not

be acquired, and subsequently lost, the domicile of origin is said to revert.[1]

(2.) *Domicile of Choice.* This is the civil status that is acquired by an individual as a consequence of residence in a place, other than that of his birth, with the intention of remaining.[2]

(3.) *Domicile by Operation of Law.* This status results when a dependent person passes under the control of a legal superior. Such is the case with the domicile of a woman at marriage, or of a child at adoption, or when an illegitimate child is legitimated in accordance with the law of the place where such legitimation occurs.[3] The domicile of dependent persons, thus created by operation of law, may change when the condition of dependency is terminated; the domicile of the wife, for example, may be changed after the death of her husband; as may that of an infant upon attaining his majority; or that of a person under constraint, when the legal constraint is removed, as when a person in the military or naval service is discharged and thereby resumes his freedom of choice in respect to movement, residence, and occupation.

Passports. It has been seen that the citizenship of an individual, when drawn in question in a foreign country, is proved by documentary evidence of allegiance. This evidence is contained in passports, and a *passport* or *certificate of origin* may be defined as a written instrument, issued by the authority of the state for the identification and protection of its citizens when travelling abroad, and containing: first, a certifi-

revert by the mere return to his native country of a merchant who is domiciled in a neutral country at the time of capture; who afterward leaves his commercial establishment in the neutral country to be conducted by his clerks in his absence; who visits his native country merely on mercantile business, and intends to return to his adopted country. Under these circumstances the neutral domicile still continues. — The *Friendschaft*, 3 Wheaton, 14.

[1] I Halleck, pp. 374, 475; Dicey, pp. 86–96; IV Phillimore, pp. 54–57; Boyd's Wheaton, § 151C.

[2] IV Phillimore, pp. 145–226; I Halleck, pp. 362–367; Dicey, pp. 73–86; Boyd's Wheaton, § 151D.

[3] Dicey, pp. 96–109; IV Phillimore, pp. 61–100; I Halleck, pp. 368–371.

cate of the citizenship of the bearer or holder; and, second, formal permission for such citizen to leave the state of his allegiance. They are issued under such regulations and restrictions as the state may see fit to impose, and bear, as a rule, the seal of the state under whose authority they have been issued. When lawfully issued they constitute evidence of identity and nationality when a question of citizenship arises in a country other than that of the individual who produces them. They are obtained upon application duly made in behalf of the individual desiring them, such application being supported by evidence of the birth or naturalization of the applicant.[1]

Issue of Passports in the United States. In the United States passports are issued by the State Department, or by such diplomatic and consular officers as the President may designate, and under such rules as he may prescribe. The officers who are entitled, by law, to issue them are vested with discretion in the matter, and may decline to furnish them to persons as to whose right to them there is any doubt.[2]

The term passport, or sea-letter, is also applied to a similar instrument issued in behalf of the owner of a vessel and certifying to his nationality as well as to the registry of the ship. The term "sea-letter" relates rather to the cargo; the term "passport," when used in this connection, having to do with the nationality of the vessel and the citizenship of its owner.[3]

[1] Klüber, § 212; I De Martens, § 84; II Ibid. § 219; Bluntschli, § 251; II Dig. Int. Law, §§ 191–195.

[2] For the statutes regulating the issue of passports to citizens of the United States, see §§ 4075–4077 Revised Statutes, and paragraphs 146–167 Consular Regulations of 1896. See also Foreign Relations of the United States, 1888, p. 1664; 1893, pp. 25, 593, 603, 530–536; 1895, part i. pp. 8–20, 514–523.

[3] Bluntschli, § 326; III Dig. Int. Law, §§ 409, 410. The term passport is sometimes applied to the safe conduct, issued by a belligerent in time of war, as a protection to a person travelling in the theatre of military operations.

References. The international view of citizenship has changed so radically in recent times as to render obsolete most of the literature, upon the subject of national character, which antedates the present century. For an account of the origin and development of the principle of popular sovereignty, to which the changed view of allegiance is largely due, see Maine, "Popular Government"; Cooley, "Constitutional Law," pp. 25, 26; Amos, "Science of Law," pp. 13–27. For the old view of allegiance, see Grotius, bk. i. chap. i. par. v. note, 28–32; chap. iii. par. ix.; bk. ii. chap. iii. par. viii.; and Vattel, liv. i. chap. xix. For the modern view, see I Halleck, chap. xii.; Heffter, chap. i. § ii. Considerable interest in the subject of allegiance and national character was manifested by many nations between the years 1860 and 1880. During this period a number of naturalization treaties were negotiated. For information upon the subject of Naturalization, Expatriation, and Domicile, the student is referred to existing naturalization treaties, to reports of commissions upon those subjects, and to the new works, or new editions of old works, which have appeared since 1870. In this connection see Hall, §§ 66–74, appendix iii.; I Halleck, chap. xii.; Heffter, chaps. i. ii.; see also the "Report of the English Naturalization Commission of 1868" ("Diplomatic Correspondence of the United States, 1873," part ii. pp. 1232–1424), and the naturalization treaties of the United States; "Treaties and Conventions of the United States, 1776–1870," vol. i.; "Revue de Droit International," pp. 102–112; ii. Ibid. pp. 107–120; xii. Ibid. pp. 312–316; xx. Ibid. pp. 498, 607; xxx. Ibid. pp. 413–444; Foreign Relations of the United States, 1877, pp. 246–252; 1882, Ibid. pp. 344–346; 1885, Ibid. p. 392; 1886, Ibid. p. 315; 1887, Ibid. pp. 1073, 1074; 1888, Ibid. p. 1648; 1893, Ibid. pp. 569, 572, 699, 706, 715. The rules of domicile are very fully discussed in Wharton and Story; I Halleck, chap. xii.; Heffter, chap. i. § iii.; III Phillimore, chaps. iii.–xiii.; Hall, pp. 220–241 and 572; Dicey on Domicile; Boyd's Wheaton, pp. 118–212; Bar, "International Law," §§ 29–32, 39; Lawrence, Int. Law, §§ 114–118; II Dig. Int. Law, §§ 171–207; Pomeroy, § 171; Walker, Int. Law, pp. 204–221.

CHAPTER V

EXTRADITION

The Right of Criminal Jurisdiction. The right of a state to try and punish offenders for crimes committed within its territorial limits is indisputable, being an essential incident of its sovereignty. It matters not by whom such offences have been committed, for all persons, whether citizens or aliens, are, in this regard, subject to the law of the state in which they may be at any time; the presumption being that, by entering the territory of a state, they voluntarily submit themselves to the operation of its laws. They are also presumed to know those laws, and a plea of ignorance as to their requirements will not shield them from the consequences of disobedience. Nor can an individual claim the protection of his own government in any course of action which is opposed to the law of the state in which he is sojourning. He can demand such protection, as of right, only when his behavior has been correct, and his conduct in all respects lawful.

Duty of a State as to Crimes Committed Abroad. The duty of a state to assist other states in the execution of their criminal laws is less generally conceded. Some writers have maintained that it is incumbent upon every state to refuse asylum to, and upon proper application to deliver up, all persons charged with crimes of excessive atrocity, or which affect the peace and security of society.[1] The contrary view, that

[1] Chancellor Kent advocates this view and, after citing authorities in its support, gives it as his opinion that it is based upon the plainest principles of justice.—I Kent, Holmes ed. p. 37. The contrary view, however, that extradition can only be had in pursuance of treaty

extradition is a matter of comity, or treaty stipulation, has been as ably maintained, and is now more generally accepted by text writers of authority,[1] and sanctioned by the usage of nations.

Surrender by Comity and Treaty. The practice of refusing asylum to foreign criminals, and of surrendering them through comity, prevails to a considerable extent on the continent of Europe. In England and the United States the almost invariable practice has been to surrender criminals only in accordance with treaty stipulations. While no positive rule

stipulations is the one now generally accepted.—I Halleck, chap. vii. § 28; I Twiss, § 237. There is nothing in the law of nations, as explained by the usage and practice of the most respectable among them, which imposes on us any obligation to deliver up fugitives from foreign justice.—I Opinions of Attorney-General, p. 521. The international extradition of fugitives from justice is a duty of comity, not of strict right.—Wing's case, VI Opinions of Attorney-General, p. 85, Cushing (1853). It is the settled policy of the United States not to make such extradition, except in virtue of express stipulations to that effect. Hence the United States ought not to ask for extradition in any cases as an act of mere comity.—Ibid. According to the practice of the Executive Departments, the President is not deemed to be authorized to order the delivery of fugitives from justice in the absence of any express provision by treaty.—III Opinions of Attorney-General, p. 661. A foreign government has no right, by the law of nations, to demand of the Government of the United States a surrender of a citizen or subject of such foreign country who has committed a crime in his own country, and is afterwards found within the limits of the United States. It is a right which has no existence without, and can only be secured by, a treaty stipulation.—Case of José Ferreira dos Santos, II Brockenbrough, 493.

[1] Hall, pp. 59, 60; Bar, p. 17, and pp. 623–625, 685–686, 702–737. *Case of Carl Vogt.*—The extradition of Carl Vogt, who was charged with burglary, robbery, and murder, committed in Belgium, was asked of the United States by the Belgian Government in 1873; there being no extradition treaty with that power, his surrender was requested on the ground of comity. After prolonged consideration of the request the Belgian minister was advised that Vogt's surrender, as an act of comity, was impossible on the ground that "the authority of the Executive to abridge personal liberty within the jurisdiction of the United States, and to surrender a fugitive from justice in order that he may be taken away from their jurisdiction, is derived from statutes of Congress, which confer that power only in cases where the United States are bound by treaty to surrender such fugitives, and have a reciprocal right to claim similar surrender from another power."—United States Foreign Relations, 1873, part i. p. 81; see also XIV Opinions of Attorney-General, p. 281.

can be laid down upon this subject, it may, perhaps, be said that extradition by comity is more common among states having strongly centralized governments, than in those in which representative institutions are so firmly established as to constitute an efficient check upon the executive branch of the government, and where restrictions upon personal liberty are not readily tolerated.[1]

Difference of View as to Criminal Jurisdiction. The views as to criminal jurisdiction which prevail in different states vary considerably, and depend, in any particular state, partly upon its constitution and partly upon the source from which it derives its system of law. In England and the United States, where the common law prevails, criminal jurisdiction is regarded as strictly territorial. Crimes are tried and punished at the place of their commission, and criminal courts have no jurisdiction over offences committed beyond, or outside of, certain territorial limits, which are exactly defined in the laws which create them. These states, therefore, are willing to surrender criminals who have taken refuge within their borders, even when they are subjects of the surrendering state. They object to such surrender only when the offence is of a political character, when the definitions of crime in the demanding state are much stricter than their own, or when the forms of trial are such as to be regarded as unjust, or unfair, when judged by their own standards of criminal procedure. Among the Continental states of Europe, and in those of Central and South America, whose systems of jurisprudence are largely based upon the Roman law, a different view of jurisdiction prevails. The law of the state is presumed to follow a subject wherever he may go, and to control and regulate his actions and conduct to the same extent abroad as at home. Their criminal courts, therefore, have power in cer-

[1] See note 1 to page 167. Spain surrendered one Tweed, a fugitive from justice in the State of New York, in 1876, and Japan surrendered one Calvin Pratt, through comity, in 1885. Pratt was charged with forgery and embezzlement, and was surrendered on condition that his case was not to constitute a precedent. See also Foreign Relations of the United States, 1878, p. 560.

tain cases to try the *case* if the *person* of the offender is subject to their jurisdiction, and so can punish a subject after his return home, for a crime committed abroad. These states, therefore, while they will surrender foreign criminals who have escaped to their territory, hesitate, and often decline, to surrender their own subjects for crimes committed abroad.[1]

[1] Lawrence, Int. Law, §§ 132, 133; I Twiss, §§ 240–242; Walker, Sci. Int. Law, pp. 232–238; Klüber, § 66; Heffter, § 63. "Three causes have operated, during the present century, to diminish extra-territorial pretensions in criminal matters: (1) The growth of the idea of nationality and of equality; (2) the development and extension of commercial intercourse; (3) the more general recognition and performance, by independent states, of their rights and duties under international law. The first cause has operated to produce a clearer apprehension of the objects of national existence, and of the bounds of national authority; the second has rendered more apparent the necessity of personal immunity from vexatious and unjust prosecutions under foreign and unknown laws; the third has made governments more ready to abandon assumptions of authority which infringe the rights of other sovereign powers. The infliction of punishment involves an exercise of power, and power implies subjection. This principle holds good in public as well as in private affairs. The punishment by one state of the citizen of another state for an act for which he is solely answerable to the laws of the latter, or even for an act for which he was not answerable to the laws of the former, is a public wrong. For a nation to hold its penal laws to be binding on all persons within the territory of another state, is to assert a right of sovereignty over the latter, and to impair its independence. A state may, if it see fit, tie its criminal law about the neck of its citizen, and hold him answerable for its violation everywhere. But even this power of control has its limitations. For the citizen so bound is, nevertheless, not exempt from obedience to the law of the place where he may be, and it would be no defence to a charge of having violated it to say that the act complained of was required by the penal law of his own country. The local allegiance would be paramount; his double allegiance would be his misfortune, for relief from which he could appeal to the mercies of his own government alone. When a man in his own country violates its laws, he is answerable, for his misconduct, to those laws alone; and it is his right to be tried under them, and in accordance with the methods of procedure which they prescribe. To say that he may be answerable to another law, because the person he attacks is a foreigner, would, in principle, subject him in his own country to a dual, but to an indefinite, responsibility. Such a pretension is an assertion, not only of an *imperium in imperio*, but of *imperia in imperio*. It would expose citizens and all other persons in the United States to liability to as many penal systems as there happened to be nationalities represented in the foreign popula-

The Cutting Case. Although this case is, in strictness, an example of the interposition of a state to protect its citizens abroad, it illustrates, at the same time, an important difference which now exists, as to the right of a state to punish acts, in violation of its laws, committed not only beyond its boundaries, but within the territorial jurisdiction of another state. Cutting was an American citizen, and a resident of El Paso, in the State of Texas, where he was engaged in the publication of the *Centinela*, a weekly newspaper. In June, 1886, Cutting published an article defamatory of one Medina, a Mexican citizen. He afterward crossed the Rio Grande into Mexican territory, where he was arrested on a charge of criminal libel, in violation of paragraph 186 of the Mexican Penal Code, a statute which, under certain conditions, confers jurisdiction upon the criminal courts of that state to try offences against citizens of Mexico committed by foreigners in foreign territory. Mr. Cutting was brought before a local criminal court, and required to sign a "reconciliacion," an instrument peculiar to Mexican jurisprudence, which operated as a settlement between the parties, in consideration of which the aggrieved party abandoned further criminal proceedings. Cutting then returned to the United States, where he published a card in the *Centinela*, in which he reiterated his former charges, and added others, in which he characterized Medina's action as contemptible and cowardly. Returning to Mexican territory on June 23d, he was again arrested, presumably on the same charge. His trial, which resulted in a conviction, was completed on August 7th, and he was sentenced to imprisonment at hard labor for one year, in addition to which a fine of $600 was imposed, and, in default of payment, his confinement at hard labor was to continue for a further period of one hundred days. The case was carried, by way of appeal, to the Supreme Court of the State of Chihuahua,

tion. Every fresh accession to that population would extend the operation, and potentially increase the variety of foreign penal systems in force in this country. The mere statement of such a proposition is a sufficient refutation of it."—Foreign Relations of the United States, 1887, pp. 839, 840.

where the sentence of the lower court was affirmed, but the prisoner was released on the ground that the plaintiff had withdrawn from the prosecution of the suit.

As the act of publication had taken place within the territorial jurisdiction of the United States, the American minister to Mexico was instructed, on July 19th, to demand the instant release of Mr. Cutting, upon the ground that the offence had been committed in a place beyond the jurisdiction of Mexico, and the assumption of the Mexican tribunal to punish a citizen of the United States for an offence against the law of Mexico, wholly committed and consummated in his own country, was an invasion of the sovereignty and independence of the United States. The Mexican Government contended that the act of its tribunal was justified by the rules of international law, and that the question of determining whether the case was triable in Mexico, or not, was one which was to be decided by the courts of that state. The Mexican minister does not seem to have relied, chiefly, if at all, upon the ground that the publication of the libel in Mexico would have operated to confer jurisdiction upon its courts to try the case, but rested his argument upon the grounds above stated. The correctness of the views advanced by the Mexican Foreign Office was denied by the United States, and its demand was persisted in. The case terminated with the release of Mr. Cutting under the decision rendered by the court of appeals.

The affair illustrates the difference of view, in respect to the power to punish crime, which exists between states whose legal systems are based upon the Roman law, and those whose jurisprudence is derived from the common law; the view of the former being that a state has power to punish the offence, wherever committed, whenever the offender is found within its jurisdiction; the latter, on the other hand, regard jurisdiction to punish crime as strictly territorial in character, and that an offence can only be lawfully tried and punished in the territorial jurisdiction in which it was committed. The common law view of the matter is supported by the principles of international law, as those principles are now generally accepted

and understood. If a state is sovereign and independent within its territorial limits—a doctrine that lies at the basis of the law of nations—the right to try and punish crimes, committed within its territory, is an essential attribute of sovereignty, and the attempt to try such offences in an alien jurisdiction is an invasion of such sovereignty to the extent of the jurisdiction exercised in the particular case.[1]

As a result of increased international intercourse, and with the rapid extension of commerce which has taken place in recent times, each group of nations has found it necessary to modify, to some extent, its peculiar view of criminal jurisdiction. All modern nations punish the crime of piracy, wherever committed; and most of them punish their own subjects for engaging in the slave-trade. England and the United States punish many crimes committed by their subjects beyond their territorial jurisdiction, especially on the high seas. On the other hand, many Continental states find it no longer necessary to assert so extensive a jurisdiction, in criminal matters, as is warranted by their legal systems. Jurisdiction over many offences of small importance, amounting to misdemeanors at common law, is now generally abandoned by them, and crimes of a more serious character are triable only on complaint of the injured party, when both have come within their territorial jurisdiction. Most states, however, punish crimes against the state, such as treason, counterfeiting, etc., wherever committed, when the person of the criminal is found within their jurisdiction.[2]

[1] For the correspondence in this case, see Foreign Relations of the United States, 1886, pp. 691–707; 1887, Ibid. pp. 751–867; 1888, Ibid. pp. 1113, 1189, 1199, 1201. For an exhaustive report on the questions of international law involved, see the Report on Extraterritorial Crime, by J. Bassett Moore, Assistant Secretary of State, For. Rel. of the U. S. 1887, pp. 757–867; see also vol. xx. Revue de Droit International, pp. 559–577; xxii. Ibid. pp. 234–250.

[2] The following summary of the practice of the principal states of the world, in respect to the punishment of offences committed abroad, is extracted from the report of Assistant Secretary Moore in the Cutting case:

"Foreigners are punished who, outside of the national territory and jurisdiction, commit offences:

"(1) *Against the safety of the state;* (a) By France, Germany, Austria, Hungary, Italy, Luxembourg,

Extradition. The term *extradition* is applied to the legal process by which one sovereign state, in compliance with a formal demand, surrenders to another state, for trial, the person of a criminal who has sought refuge within its territory.[1]

the Netherlands, Norway, Russia, Sweden, Greece, Brazil, Spain, Switzerland; (b) *not punished* by Denmark, Great Britain, Portugal.

"(2) *Counterfeiting seals of the state, national moneys having circulation, national papers or bank bills authorized by law;* (a) *Punished* by France, Germany, Austria, Belgium, Hungary, Italy, Luxembourg, the Netherlands, Norway, Sweden, Greece, Brazil, Spain, Switzerland; (b) *Not punished* by Denmark, Great Britain, Portugal.

"(3) *Other offences:* (a) General jurisdiction of offences committed abroad, by foreigners against subjects, is claimed by Greece and Russia; (b) Such offences are punished by Sweden and Norway, if the King orders the prosecution; (c) *Crimes*, but not *delits*, committed by foreigners in another state are punished by Austria, provided that (except in the case of crimes, specified under 1 and 2), an offer of surrender of the accused person has first been made to the state in which the crime has been committed, and has been refused by it; (d) criminal offences committed abroad by foreigners are punished by Hungary, if the minister of justice orders the prosecution, provided the act is punishable at the place of commission, that it has not ceased to be punishable there, and that the competent authority does not undertake to punish it; (e) criminal offences, committed by foreigners, against Italians in another state, are punished by Italy, but only when (except in the cases under 1 and 2) an offer of surrender of the person accused has been made to the state in which the crime was committed, and has been refused by it, unless the crime was committed within three miles of the frontier, or stolen property has been brought into the kingdom; (f) non-bailable offences, committed abroad by foreigners, are punished by Brazil, if the prosecution is authorized by the government, and the laws of the criminal's country punish foreigners in like cases; (g) criminal offences, committed outside of the state, by foreigners against citizens or subjects, are not punished, under any conditions, by France, Germany, Belgium, Denmark, Great Britain, Luxembourg, the Netherlands, Portugal, Spain, or Switzerland."[a]

[1] I Moore on Extradition, § 1; Spear, Ibid. pp. 70, 71; Heffter, § 63; Klüber, § 66; Bluntschli, §§ 394-401; Lawrence, Int. Law, § 132; Pomeroy, § 198; Vattel, liv. ii. chap. vi. §§ 75-77; Dana's Wheaton, § 181, note 73; Walker, Science of Int. Law, pp. 232-238.

[a] Foreign Relations of the United States, 1887, pp. 757-867. In the case of the United States *vs.* Arjona, decided by the Supreme Court in 1886, it was held that the counterfeiting of foreign securities, whether national or corporate, which have been put out under the sanction of public authority at home, especially the counterfeiting of bank notes and bank bills, is an offence against the law of nations; and that, consequently, the Congress of the United States has authority, under its constitutional power to provide for the punishment of offences against the laws of nations, to enact laws to punish the foreign counterfeiting of foreign securities in the United States.—United States *vs.* Arjona, 120 U. S. 479.

Methods of Extradition. Extradition may be effected in three ways: 1st. By treaty; 2d. In accordance with authority conferred by municipal law; 3d. By comity.

Few extradition treaties were in existence at the beginning of this century, and most of those now in force have been negotiated within the last thirty years. Their number is steadily increasing, and the present tendency is to regulate the surrendry of criminals exclusively in accordance with their stipulations. These treaties are usually construed with great strictness; the list of criminal offences contained in the body of the treaty is rigidly adhered to, and requests for the extradition of persons charged with crimes not mentioned in such lists are almost invariably refused.[1]

Extraditable Offences. The crimes for which extradition may be requested are those as to which there is a concurrence of opinion among all civilized states as to definition and punishment, and, also, as to the kind and amount of evidence necessary to secure a conviction. Wherever that course seems necessary, they are accurately defined in treaties. Those common to most extradition treaties are, arson, assaults of an aggravated character, burglary, counterfeiting, embezzlement (either of public money, by public officers, or by persons hired or salaried), forgery, larceny, murder, piracy, rape, and robbery.

Request for Extradition, by whom Made. In general the request for extradition, and the consequent surrender, are acts of high sovereign authority, and are made in the formal diplomatic way.[2] In the extradition treaty between the United

[1] For a general discussion of the subject, see vol. xvii. Revue de Droit Int. p. 375; xix. Ibid. p. 545; xx. Ibid. pp. 36, 54; Hall, § 13, pp. 59-61; Bar, §§ 147-153; I Phillimore, §§ 371-389.

[2] To justify the commencement of process in extradition, it must appear that the criminal acts charged were committed within the territorial jurisdiction of the demanding government.—David's case, VIII Opinions of Attorney-General, p. 215, Cushing (1856). All demands of international extradition must emanate from the supreme political authority of the demanding state.—VII Opinions of Attorney-General, p. 6. There can be no actual extradition without proper requisition to that effect, addressed by the foreign government to the Secretary of State. —VIII Ibid. p. 240. A foreign *mandat d'arrêt*, setting forth the offence of a fugitive from the jus-

States and Mexico, however, requests for extradition may be made by the governors, or other civil authorities, of the frontier states, or, in case the civil authority is suspended, then through the military officer in chief command of such state or territory.

Conditions of Extradition. The following provisions are included in most treaties and statutes on the subject of extradition:

(*a.*) The more serious crimes only, amounting to felony at common law, are extraditable.

(*b.*) Those crimes only are extraditable as to which there is a general agreement, among civilized states, in the matter of definition, proof, and punishment.

tice of a foreign country, within the terms of any treaty of extradition, such *mandat*, coming through the proper political channel, is sufficient foundation for the issue of the President's warrant authorizing the institution of proceedings before the judicial authorities of the United States.—Sucillon's case, VII Ibid. p. 285, Cushing (1855). A mere notification by the local officer of a foreign government of the escape of an alleged criminal is not sufficient *prima facie* evidence of a case to justify the preliminary action of the President. —María Theresa Gerk's case, VII Ibid. p. 6, Cushing (1854). Any competent magistrate may take jurisdiction of a question of international extradition voluntarily; that is, without the previous application of the foreign government, or issue of the preparatory letters permissive of the President. —Wetherwax's case, VIII Ibid. p. 240, Cushing (1856). A commissioner for the United States, appointed by the circuit court, is a magistrate within the meaning of the law and of the treaty of Washington, and as such has power to apprehend, examine, and certify as to fugitives from justice.—IV Ibid. p. 201. A requisition for a fugitive is not necessary to a preliminary examination upon which the evidence of criminality is to be heard and considered, but with a view only to the surrender, after the ascertainment of the facts showing the party charged to be in a condition which justifies the apprehension and commitment for trial according to the laws of the place where he or she shall be found.—Ibid. The mode of procedure in such cases is the preferment of a complaint to a judge or magistrate, setting out the offence charged on oath, whereupon the judge or magistrate may issue a warrant for the apprehension of the person accused. Upon the accused being brought before the judge or magistrate, the latter should hear and consider the evidence of criminality; and if on such hearing the evidence be deemed sufficient to sustain the charge, the same should be certified to the executive authority, that a warrant may issue for the surrender.—Ibid.

(*c.*) The sufficiency of evidence as to the crime for which extradition is asked is determined, in a majority of cases, by the law of the state in which the criminal has taken refuge.[1]

(*d.*) A state, before giving effect to a request for extradition, will punish the criminal for any offence which he may have committed against its own municipal laws.

(*e.*) Most states will surrender a criminal only with the understanding that he is to be tried for the crime mentioned in the request for extradition, and for no other.[2]

(*f.*) Many states, for a reason already given,[3] decline to sur-

[1] *In re* Ezeta, 62 Fed. Rep. p. 972. A fugitive from the justice of Great Britain, charged with the commission of the crime of murder in Scotland, apprehended in the United States, and examined before a commissioner, and by him certified to be probably guilty on the evidence adduced, should be delivered up to justice, if the evidence upon which the application is founded be such as, according to the laws of the place where the fugitive shall be found, would justify his or her apprehension and commitment for trial if the crime had there been committed. — Christiana Cochrane's case, IV Opinions of Attorney-General, p. 201, Nelson (1843).

[2] In Lawrence's case (XV Opinions of Attorney-General, p. 501), it was held that "where a fugitive is extradited under the treaty of 1842 between Great Britain and the United States (Pub. Trs. p. 432), and where the surrender is effected pursuant to the British act of 1870, the provisions of the act of 1870 have no bearing whatever upon the rights or duties of the government under the treaty." It was also held that the treaty of 1842 with England does not forbid the trial of a fugitive delivered under it for an offence other than that for which he was surrendered. The practice and decisions in the United States, the decisions in Canada, and the understanding of the executive and judicial authorities of Great Britain have all agreed in considering that fugitives when surrendered to justice are surrendered absolutely, and that a prisoner so surrendered is subject to trial for offences other than the particular offence for which he was surrendered. Upon the point that a surrendered criminal may, in the absence of any prohibition in the treaty, be tried for offences other than those for which he was surrendered, see also United States *vs.* Caldwell, 8 Blatchford, 131; United States *vs.* Lawrence, U. S. C. C. So. Dist. N. Y., Benedict, J., March, 1876; Adriance *vs.* Lagrave, 59 N. Y. R. 110. And in Canada, Paxton's case, 10 Low. Can. Rep. 212, 11, 352; Von Aernam's case, Up. Can. Rep. 4 C. P. 288; *In re* Israel Rosenbaum, Supreme Ct. Canada, 1874. See also Ex. Doc. H. R. 173, 44 Cong. 1 Sess.; Foreign Relations of the United States, 1876, pp. 204–240, 261–264; 1877, pp. 271–279 (Winslow's case). See also II Moore, §§ 170–172.

[3] See pp. 168, 169.

render their own citizens, or subjects, whose extradition is asked by a foreign state.[1]

(*g*.) Most states refuse to surrender persons charged with political crimes.[2]

(*h*.) Due regard being had to differences between codes of criminal law and procedure, crimes can best be tried and punished at the place where they were committed.

Extradition Treaties of the United States. The United States has thus far negotiated thirty-seven extradition treaties.[3] The first was entered into in 1794, and is comprised in Article 27 of Jay's Treaty with England. It included the crimes of murder and forgery only, and contained no stipulation as to the manner in which persons, charged with either of these crimes, were to be extradited. No legislation was had by Congress for the purpose of carrying that part of the treaty into effect, and, as it was not self-executing, it was held to be legally inoperative, and expired by limitation in 1806.[4]

[1] Boyd's Wheaton, pp. 165, 166. I Phillimore, § 367.

[2] Emigrants and exiles for cause of political difference at home are entitled to asylum in this country, but not malefactors; on the contrary, the foreign government which reclaims its fugitive malefactors is serviceable to us by ridding us of the intrusive presence of crime.—Sucillon's case, VII Opinions of Attorney-General, p. 536, Cushing (1855); vol xxix. Revue de Droit Int. pp. 5–16; xxiv. Ibid. pp. 17–39; xiv. Ibid. pp. 403, 475.

[3] When reclamation of a fugitive from justice is made under treaty stipulation by any foreign government, it is the duty of the United States to aid in relieving the case of any technical difficulties which may be interposed to defeat the ends of public justice, the object to be accomplished being alike interesting to both governments—namely, the punishment of malefactors, who are the common enemies of all society.—VII Opinions of Attorney-General, p. 536.

[4] Thomas Nash, *alias* Robins, was charged with having committed murder on board the *Hermione*, a British war vessel, on the high seas; requisition was made by the British minister for the delivery of the offender under the twenty-seventh article of the treaty of 1794. (Pub. Trs. p. 379.) The district judge of South Carolina, before whom the prisoner was brought by habeas corpus, made an order, as is stated, at the particular request of the President of the United States, that, as there was sufficient evidence of criminality to justify the apprehension and commitment for trial of the prisoner, he be delivered over by the marshal of the court to the British consul under the twenty-seventh article of the treaty.—Bee's Adm. Rep. p. 267. This was the celebrated case of Robins, who claimed to have been an impressed American sea-

Of the extradition treaties entered into by the United States, twenty-two contain the provision that political offences are not extraditable, though none of them contain a definition of the term. Twenty-three contain a provision that citizens of the state upon which the demand is made are not to be surrendered; as citizens are not excepted in the other treaties, the presumption is that they would be surrendered upon due application. Twenty-four of them contain a clause authorizing the surrendering state to try and punish offences against its own laws before giving effect to the extradition process. In all of them it is expressly stipulated that the sufficiency of evidence as to the commission of the crime for which extradition is demanded shall be determined by the laws of the state in which the criminal has taken refuge.[1]

Interstate Extradition. The subject of interstate extradition in the United States is regulated by the Federal Constitution, which provides that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."[2] This provision covers only cases arising within

man. This surrender gave rise to attacks upon President Adams, and the speech of Mr. Marshall, afterwards Chief-Justice, is attached as a note to the above report. See Wharton's State Trials, pp. 392–456.

[1] In the United States it has been held that a person detained under extradition process, regularly issued under authority conferred by a statute or treaty of the United States, is not subject to release under a writ of habeas corpus.—*In re* Breen, 73 Fed. Rep. p. 458; *In re* Newman, 79 Ibid. p. 622; *In re* Bryant, 80 Ibid. p. 282; *In re* Otieza y Cortez, Petitioner, 136 United States, p. 330; Benson *vs.* McMahon, 127 United States, 457; Fong Yue Ting, 149 United States, pp. 698, 714; Ornelos *vs.* Ruiz, 161 United States, 502. The contrary rule prevails, however, in England, based upon the statute regulating the practice of extradition (33 and 34 Vict. chap. lii. §§ 3 and 11), which expressly provide that the writ shall issue when there is reason to believe that the accused is a political offender. By section 11 of the same statute the writ is demandable by any person arrested with a view to his extradition, within fifteen days subsequent to his arrest.—See Ornelos *vs.* Ruiz, 161 United States, 502.

[2] Constitution of the United States, § 2, art. 4.

the territorial limits of the United States. The power to surrender fugitives, who, having committed offences within the jurisdiction of a *foreign* state, have fled to one of the United States for shelter, belongs, under the Constitution, exclusively to the United States.[1] The practice of extradition between the states of the Federal Union is carried on with nearly as much strictness as is that between foreign nations, and in accordance with similar rules. It has been decided, however, by the Supreme Court of the United States that the term "other crime," as used in the extradition clause of the Federal Constitution, refers to the definition of the offence according to the law of the state in which the crime has been committed.[2] In this respect the rule of interstate extradition is opposed to

[1] George Holmes was arrested in the State of Vermont on a warrant or order of the governor of the state, addressed to a sheriff, stating that an indictment had been found against him for murder in Canada, and that as it was fit and expedient that he should be made amenable to the laws of the country, commanding the sheriff to convey him to the border between Canada and Vermont, and deliver him to the Canadian authorities. A habeas corpus was issued by the supreme court, and the prisoner was remanded, and a writ of error taken to the Supreme Court of the United States. The court being equally divided as to the question of jurisdiction, the writ of error was dismissed. The court, however, considered at length the question of the authority of the governor of the State of Vermont to surrender a fugitive criminal, and Chief-Justice Taney, in his opinion, in which Justices Story, McLean, and Wayne concurred, stated, as the conclusion of the majority on this point: "Upon the whole, therefore, my three brothers and myself, after a most careful and deliberate examination, are of opinion that the power to surrender fugitives, who, having committed offences in a foreign country, have fled to this for shelter, belongs, under the Constitution of the United States, exclusively to the Federal Government, and that the authority exercised in this instance by the governor of Vermont is repugnant to the Constitution of the United States."—Holmes *vs.* Jennison, 14 Peters, 540. After this opinion Holmes was discharged by the supreme court of Vermont on habeas corpus. A similar question arose in New York in 1874, Governor Dix having ordered the surrender of Carl Vogt, *alias* Stupp, after a refusal by the President to surrender him to Germany, as the offence was committed out of her territory, or to Belgium, in the absence of treaty provisions. The court unanimously agreed in discharging the prisoner, on the ground that the governor had no power to make the surrender. — The People, Barlow *vs.* Curtis, 50 N. Y. R. 321.

Kentucky *vs.* Dennison, 24 Howard, 66.

the international rule on the same subject. This should be the case, as the systems of criminal law and procedure, the rules of evidence in criminal cases, and the punishments imposed for criminal offences, in the several states of the Union, are so nearly the same as to make the observance of the international rule unnecessary.

The same tribunal has also held, in a leading case, that "where demand is made in due form, it is the duty of the executive on whom the demand is made to respond to it, and he has no moral right to refuse. Nevertheless, if he does refuse, no power has been conferred on the Federal courts to compel obedience, and the governors of states have often refused compliance with the demand, when, in their opinion, substantial justice did not require it."[1]

References. For the latest and most valuable discussion of the important subject of Extradition, both international and interstate, see "Moore on Extradition," by J. B. Moore, formerly of the Department of State, but now Professor of International Law in Columbia College; see also Spear's "Law of Extradition"; Hall, "International Law," p. 60; I Halleck, chap. vii. §§ 28–35; Boyd's Wheaton, pp. 156–162, and pp. 645–650; Amos, "Science of Law," p. 263; Klüber, §§ 60–66; I G. F. De Martens, §§ 99–102; Heffter, §§ 63, 63a; Bar, p. 17, and pp. 620–737; Teichmann, "Les Délits Politiques, le Régicide et l'Extradition," in vol. xi. of the "Revue de Droit International," pp. 475–524; see also vol. xiv. Ibid. pp. 403–413, 475–526; vol. xvii. Ibid. p. 375; xix. Ibid. p. 545; xx. Ibid. pp. 36, 55; xxiv. Ibid. pp. 17–38; vol. ii. "Int. Law Digest," §§ 208–282, and "Foreign Relations of the United States for 1878," p. 268.

[1] Cooley, Const. Law, p. 191; Kentucky *vs.* Dennison, 24 Howard, 66.

CHAPTER VI

PRIVATE INTERNATIONAL LAW: THE CONFLICT OF LAWS

Relations of States and Individuals at International Law. It has been seen that "the relations of states to one another are twofold in character. Either the governments of the different states have relations to each other, or the individual citizens of the different states have relations to each other. The first class of relations give occasion to what is called 'Public International Law,' and the latter to what is sometimes called, with less precision, 'Private International Law.'"[1]

Private International Law. That branch of international law which treats of the relations of states with the citizens or subjects of other states is called *Private International Law:*

[1] Amos, Science of Law, p. 25. Modern legislation in dealing with purely private relations between individuals is more anxious to give effect to those relations as they really are, or as it is conceived that they ought to be, than to affirm the exclusiveness of the rights of sovereignty; and there are many cases in which this object is best attained by allowing the law of the country to which a foreigner belongs to operate in lieu of the local law, or by allowing a subject to be affected by a foreign instead of his national law, when the two are in conflict. The concessions and relaxations of sovereign rights which it has become customary for civilized nations to make for these reasons have given rise to a body of usage of considerable bulk, called private international law. Private international law is not, however, a part of international law proper. The latter, as has been seen, is concerned with the relations of states; in so far as individuals are affected, they are affected only as members of their state. Private international law, on the other hand, is merely a subdivision of national law. It derives its force from the sovereignty of the states administering it; it affects only the relations of individuals as such; and it consists in the rules by which courts determine within what national jurisdiction a case equitably falls, or by what national law it is just that it shall be decided.—Hall, § 10, p. 54.

or, as it is a question of determining whether the courts of a state are to apply their own municipal law, or that of another state, in the decision of a given cause, it is sometimes called, and with greater accuracy and propriety, the *Conflict of Laws.*

The Practice Based on Comity or Consent. From the definition of sovereignty it has been seen that "the jurisdiction of a nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitations not imposed by itself. Any restriction upon it deriving validity from any external source would imply a diminution of the sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."[1] The extent, therefore, to which the courts of one state may apply the laws of another in the decision of cases, as it is based upon comity or consent, must be determined by the municipal law of the state in which the court sits. It may be prohibited altogether, or may be permitted subject to such restrictions as that state may see fit to impose in accordance with its views of justice or expediency.[2]

Origin of the Practice. The rules of private international

[1] Case of the Exchange, 7 Cranch, 116.

[2] (1.) The laws of every empire have force only within the limits of its own government. (2.) That all persons who are found within the limits of a government, whether their residence is permanent or only temporary, are to be deemed subjects thereof. (3.) That the rulers of every empire, from comity, admit that the laws of every people in force within its limits ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments or their subjects. — Huberus, liv. i. tit. iii.; De Conflictu Legum, p. 538, § 2; vol. iii. Eng. and Am. Cyc. of Law, p. 502. By the universal practice of civilized countries, by what is known as "the comity of nations," the laws of one nation or state will be recognized and executed in another, where the rights of individuals are concerned. Whatever force and obligation the laws of one country have in another, depend entirely upon the laws and municipal regulations of such other country; in other words, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.—Huberus, liv. i. tit. iii. § 2; vol. iii. Eng. and Am. Cyc. of Law, p. 502. This comity is the purely voluntary act of the nation or state, and is totally inadmissible when the laws of the foreign state or nation are contrary to its policy, or prejudicial to its interests.— Minor *vs.* Cardwell, 37, Mo. 350, and cases cited in vol. iii. Eng. and Am. Cyc. of Law, p. 506.

law come into being through the moral claim that is presented either by persons who, not being citizens of a given country, come into the courts of justice of that country while sojourning there to have rights recognized and protected which they have acquired in their own country; or, by those who, being citizens of one country, but having acquired rights while sojourning in other countries, come into the courts of their own country to have those rights recognized and protected.

On every occasion for inventing rules applicable to these cases the question is presented whether the courts of justice of a country shall recognize rights acquired, either by their own citizens or by foreigners, in other countries; or, in other words, whether the laws of other countries, giving validity to those rights, shall or shall not be held to be effectual in the courts of justice which are invited to interfere. The cases are generally further complicated by the nature of the processes and transactions out of which the asserted rights spring. Part of the transactions may have taken place in one country and part in another, and the remedy may be sought for in a third. Or, the person seeking the remedy, or against whom the remedy is sought, may be the citizen of one country, have his permanent residence or domicile in another country, and be temporarily sojourning in the country in which the remedy is sought.

It is obvious, from a mere enumeration and description of the cases which give rise to rules, that the purpose of the existence of these rules is always the facilitation of intercourse between the citizens of different states, and the prevention of practical injustice. These objects must be served in the highest degree, if the greatest possible uniformity of principle obtain, in the courts of all nations, in creating and applying the rules. In this way reasonable expectations are likely to be best satisfied, and fraudulent invasions of the law of any particular country are likely to be most effectually prevented. It happens, however, that, owing to the political jealousies that have hitherto kept apart the most considerable nations of Europe, and to the foolish prejudice with which individual

nations have fostered principles of law familiar in their own courts, however alien to the practice of all other countries, there have hitherto been made only very imperfect attempts at uniformity, either of principle or practice, in this respect. It is probable that an increasingly clear apprehension of the logical relations of the different branches of law touching ownership, contract, family life, or crime, will produce the effect of assimilating the substance, as well as the form, of the rules of law forming the so-called "Private International Law of different countries." [1]

As the practice of private international law is based upon the comity of nations, it is obvious that it cannot antedate in its origin the recognition of comity as a general international obligation. The remote origin of the practice, however, is much more ancient, and can be traced to the *jus gentium* of the Romans, which was, in substance, a formal recognition of the principles involved in private international law by the greatest state that has ever existed. The Roman civil law applied to Roman citizens alone; the *jus gentium*, or law of nations, was made up of those principles of law which were common to all the nations of which they had any authentic knowledge. This system was administered by the Roman courts during the existence of the empire, and was revived, by Grotius, more than a thousand years after the downfall of the state in which it had originated, for the purpose of furnishing a logical and legal basis for the new science of international law.[2]

The rules of domicile, which lie at the base of the subject, were the first to receive attention, and to be made the subject of judicial decision. This was especially true of their application by prize-courts in ascertaining the domicile of owners of captured vessels, with a view to determining the nationality, and so the liability to capture and condemnation, of their

[1] Amos, Science of Law, pp. 26, 27; Hall, § 10, p. 54; IV Phillimore, chap. i.; Wharton, Com. on Amer. Law, § 252.

[2] IV Phillimore, chap. i. §§ 1, 9–13; Maine, Int. Law, pp. 20, 26–28; Bar, § 2.

property. Aside from this, however, but little attention was paid to the subject, as a matter of public law, until after the middle of the seventeenth century, when the rules regarding the treatment of aliens began to be relaxed in severity, and the alien class began to receive protection in their personal and property rights. Its progress has not been rapid at any time, though an increased interest in it has been manifested since the beginning of the present century, and all states that are parties to international law now recognize its rules, and, to a greater or less extent, permit their courts to apply them in the decision of cases arising within their jurisdiction. Their practice is far from uniform, however, some states being slow to recognize their binding force, while others constantly seek to extend their field of operation, at times going so far as to negotiate treaties for that purpose. The *tendency* of all modern states is in the same direction, though some move more rapidly than others.[1]

3. *Subjects Treated of in Private International Law.* The rules of private international law have chiefly to do—

(1.) With the legal status of aliens, and with their capacity to do certain acts in a state, *not* in accordance with *its* municipal law, but in accordance with the municipal law of another state.

(2.) With questions arising as to the validity of foreign marriages or divorce.

(3.) With similar questions arising as to the validity or binding force of contracts or agreements.

(4.) With questions connected with the ownership, or transfer, of land and goods.

(5.) With foreign judgments and bankruptcies.[2]

Limitations upon the Practice of Private International Law. The courts of a state, in applying the rules of private international law in any one of the foregoing cases, cannot give effect to, or apply, a foreign law which imposes a penalty,

[1] IV Phillimore, §§ 1-21; Story, Conflict of Laws, §§ 1-20; Wharton, Conflict of Laws, §§ 979-1006; Bar, §§ 1-27.

[2] Amos, Science of Law, p. 319; IV Phillimore, chap. ii.

or is repugnant to the municipal law, or moral standards, or public policy of their own state.[1] In accordance with this principle the following exceptions are now generally recognized:

(1.) Distinctions of rank, or caste, have no extra-territorial effect.[2]

(2.) Laws destructive of capacity are disfavored internationally; those protective of capacity are favored. To the former class would belong laws recognizing slavery, or imposing disabilities on account of religious belief.[3]

(3.) Property, whether real or personal, is subject to the *lex rei sitæ*.[4]

(4). In all matters relating to a decedent's estate, except as to realty, the law of the last domicile of the decedent is to prevail.[5]

(5.) Contracts, as a general rule, are to be governed by the law of the place of performance.[6]

(6.) Process, as a general rule, is to be governed by the *lex fori*.[7]

(7.) Persons are, in general, subject to the law of their domicile; "but, when visiting other lands, they can only claim to be invested with the law of such domicile to the extent which

[1] Wharton, Com. on Amer. Law, § 253; Ibid. Conflict of Laws, § 19; IV Phillimore, pp. 12–18. For this reason courts will not recognize the existence of slavery or polygamy, or enforce contracts which recognize slaves as property; nor will a foreigner be permitted to inflict chastisement, or practise cruelty, upon a member of his family or suite because such practices are warranted by the laws of his state or country. —IV Phillimore, pp. 16, 17; Wharton, Conflict of Laws, §§ 101–105. See also Schulze-Berge *vs.* the Guildhall, 58 Fed. Rep. 796; Brown *vs.* Amer. Finance Co. 31 Ibid. 516.

[2] Wharton, Conflict of Laws, §§ 101–105, 109; Story, Conflict of Laws, §§ 96, 104; IV Phillimore, §§ 12–25.

[3] Wharton, Conflict of Laws, §§ 5–9, 98–103; Story, Ibid. §§ 95–104.

[4] United States *vs.* Crosby, 7 Cranch, 115; Clark *vs.* Graham, 6 Wheaton, 577; Oakey *vs.* Bennett, 11 Howard, 33; Christian Union *vs.* Yount, 101 United States, 352; IV Phillimore, pp. 427–457; Story, §§ 374–463; Wharton, §§ 297–311.

[5] IV Phillimore, p. 673; Wharton, Conflict of Laws, § 560; Ibid. Com. on Amer. Law, § 339; Story, chap. xii.

[6] Wharton, Com. on Amer. Law, §§ 314–322; IV Phillimore, pp. 531–541; Story, §§ 279–282; Wharton, Conflict of Laws, §§ 397a–401p.

[7] Wharton, Conflict of Laws, §§ 704–752; IV Phillimore, p. 706; Story, §§ 530–580.

is consistent with the common law of Christendom, which is the foundation of private international law." Hence "a polygamous or incestuous marriage, even though sanctioned by a foreign state, and contracted within its borders, has no exterritorial force. Foreign judgments of divorce, to be respected, must be rendered by courts having jurisdiction according to the judgments of private international law. Foreign incapacity, arising from minority or subjection to tutelage, will only be recognized when there is something in the person so subjected to put persons dealing with him on inquiry."[1]

Effect of Foreign Judgments. A *foreign judgment* is one obtained in the courts of a foreign state, the recognition and enforcement of which is asked in the courts of the state in which the defendant is resident, or subject to legal process. The great majority of states give effect to a foreign judgment in all cases in which the following conditions have been fulfilled:

(1.) The tribunal which pronounced the judgment must have been competent, according to the law of the state to which it belonged, to decide upon the matter adjudicated upon.

(2.) The jurisdiction must have been complete both as to subject-matter and over the parties to the suit.

(3.) The foreigner who was a party must have been fairly heard before the tribunal, according to the laws of the state, and on an equality, in every respect, including the right of appeal, with a native subject.

(4.) The tribunal must have decided upon the very subject-matter which it is attempted to litigate upon, and the decision must have been final, or made by the court of last resort.[2]

Condition of Reciprocity. To these conditions some nations add another, that of reciprocity. If these conditions are

[1] Wharton, Conflict of Laws, § 19; IV Phillimore, pp. 302–312.

[2] IV Phillimore, pp. 729, 730; Story, §§ 584–618; Wharton, Conflict of Laws, §§ 792–796; Bar, § 126.

fulfilled they will constitute a valid ground upon which to base a plea in bar of a second litigation, and, if properly authenticated, the foreign judgment will be executed by them as if it were their own.[1]

Foreign Judgments, why Produced before the Courts of a State. Whenever a foreign judgment is brought to the judicial notice of the courts of a state it is with a view of obtaining one of two results:

(1.) "It may be pleaded in bar.

(2.) "It may be given effect to, and executed in the same manner as a domestic judgment."[2]

Conditions under which they are Given Effect. In accordance with the practice of most states of Christendom, foreign judgments are permitted to have effect only in the following cases:

(1.) With the consent of the state in which execution is desired.

(2.) By the authority and order of its tribunals.

(3.) When it contains no provisions or order contrary to the public morals or policy of the state in which execution of it is sought.[3]

Practice of States in the Matter of Foreign Judgments. Although there is considerable variance in the policy of states as to the effect given in each to foreign judgments, most of them are susceptible of classification under one of three heads:

(1.) "Those which recognize the rule of reciprocity.

(2.) "Those which refuse to recognize foreign judgments.

(3.) "Of England and the United States of North America, which recognize, without regard to the principle of reciprocity, the authority of a competent foreign judgment."[4]

[1] IV Phillimore, pp. 730. 731.

[2] IV Phillimore, p. 729; I De Martens, liv. iii. chap. iii. § 94.

[3] IV Phillimore, p. 728; I De Martens, §§ 94, 95; Story, §§ 815–823.

[4] IV Phillimore, pp. 731, 732.

References. The admirable treatises of Wharton and Story upon the subject of "Private International Law," or the "Conflict of Laws," both works of the highest authority, practically exhaust the subject in all its departments. Bar's "International Law" is a standard German work upon the subject, and may now be obtained in an English translation. Fœlix, "Traité de Droit International Privé" is a French work of high authority. The fourth volume of Phillimore is devoted to the subject of Domicile and Private International Law. For briefer and less elaborate accounts, see Boyd's Wheaton, §§ 78–92; I Halleck, chap. vii.; Wharton, "Commentaries on American Law," chap. v.; and Brocher's "Théorie du Droit International Privé," in vols. iv. v. of the *Revue de Droit International.*

CHAPTER VII

THE RIGHT OF LEGATION: AMBASSADORS, PUBLIC MINISTERS, CONSULS, CONSULAR JURISDICTION

Origin of the Right. The right of legation is one of the oldest, as it is one of the most generally sanctioned, of international usages. It has existed from the earliest times, and among all peoples of whom we have any authentic knowledge. It is recognized and practised to some extent even by barbarous nations in their occasional intercourse with each other.

As nations cannot treat directly with each other, it follows that intercourse between them must be carried on by means of agents or intermediaries; these agents are called ambassadors, envoys, or public ministers.[1]

The practice of maintaining public ambassadors at foreign courts, though recognized to some extent in Europe at an earlier date, did not become general until about the middle of the seventeenth century. The treaty of Westphalia, which was concluded in 1648, marked an important epoch in European history. As an immediate result of its execution the in-

[1] "But nations or sovereign states do not treat together immediately; and their rulers, or sovereigns, cannot well come to a personal conference in order to treat of their affairs. Such interviews would often be impracticable; and, exclusive of delays, trouble, expense, and so many other inconveniences, it is rarely, according to the observation of Philip de Commines, that any good effect could be expected from them. The only expedient, therefore, which remains for nations and sovereigns, is to communicate and treat with each other by the agency of procurators or mandatories—of delegates charged with their commands, and vested with their powers—that is to say, *public ministers*. This term, in its more extensive and general sense, denotes any person intrusted with the management of public affairs, but is more particularly understood to designate one who acts in such capacity at a foreign court."—Vattel, liv. iv. chap. v. § 56.

fluence of the Roman Church in secular matters was largely reduced in importance, and the principle of balance of power was, for the first time, generally sanctioned and specially guaranteed. As a consequence the foreign relations of the different European states rapidly increased in volume and intricacy, and the necessity of establishing permanent legations was generally recognized and acted upon. The profession of diplomacy soon became the most important one in which an individual could engage, and the departments of foreign affairs were regarded as the most important branches of governmental service, demanding in their administration ministers of the highest ability and the widest experience. The position assumed by the profession has been constantly maintained, and the states of Europe and America now deem it a matter of the first consequence to be ably represented, not only near the courts of the Christian states, but also at the capitals of those Eastern nations which, as yet, but imperfectly recognize the sanctions of international law.[1]

The Right of Legation. The *right* of sending and receiving ambassadors is one of the essential attributes of a sovereign state. The *obligation* to do so is less strong, and is not generally regarded as a matter of strict right. A nation, however, which refuses, without good reason, to receive a minister from a foreign power exposes itself to retorsion; and a state would run counter to the tendencies of modern civilization which rejected or refused to entertain communications from a state with which it was at peace.[2]

The power of sending and receiving ambassadors belongs also to dependent states, unless its exercise is expressly forbidden by the states upon which they are dependent. In

[1] Heffter, § 199; II Ward's Inquiry, p. 483; Hosack, pp. 2–6; Lawrence, Int. Law, §§ 141–142; Dana's Wheaton, §§ 206–208. For an account of the origin and development of modern diplomatic institutions, see Nys, Les Origines de la Diplomatie, and vol. i. Ward's Inquiry into the Foundations and History of the Law of Nations, pp. 477–507.

[2] Vattel, liv. iv. chap. v.; Heffter, § 200; Dana's Wheaton, § 206; Lawrence, § 144; Bluntschli, §§ 159–169; I Halleck, chap. viii. §§ 1, 2.

the case of confederacies the right belongs to each of the component states, unless it has been expressly surrendered by them in the treaty of confederation.

A state, though willing to receive an ambassador from another, may, for good reason, decline to receive a particular person in that capacity. It may thus decline to receive one of its own subjects, or a former subject who had been exiled or who had gone into voluntary exile, or a person of doubtful or immoral character; or one who had been engaged in a conspiracy or agitation directed against the government to which he is accredited as an ambassador.[1] "A state may also decline to receive ministers whose powers are incompatible with its constitution or public policy. For this reason no state is obliged to receive as minister the legates or nuncios of the pope. Their powers are conferred, either expressly or tacitly, by ecclesiastical laws, and an attempt to enforce them may bring the papal representative into collision with the sovereign authority of the state upon some question of a religious character."[2]

[1] It must be borne in mind that an envoy is a *person* as well as the abstract representative of his government, and that it is the prerogative of every government to require that those with whom it deals be *persona grata*, and to decide the question for itself. This government has on several occasions availed itself of this personal right, without thereby being supposed to reflect on the representative character of the person himself, and still less upon the collective representative character of his associates.—I Dig. Int. Law, § 82; Heffter, § 200; Vattel, liv. iv. chap. v. § 66; I Halleck, p. 224; Hall, § 98; Lawrence, § 146; Dana's Wheaton, § 210; Martens, Man. Dip. chap. i. § 6; Bluntschli, § 164. Foreign states have declined to receive particular persons as diplomatic representatives of the United States, on the ground that, for personal or political reasons, they were not acceptable to the government of the state to which it was proposed to accredit them. A case occurred so late as 1885, which is reported in the Foreign Relations of the United States for that year. In this case, although the incident terminated with the resignation of the minister to whose reception the objection had been taken, the matter was presented to Congress by the President in his annual message, and the post remained unfilled for a considerable period of time.—I Dig. Int. Law, §§ 84, 89; Foreign Relations of the United States, 1885, pp. 12, 48, 57, 683, 703, 710, 752, 757; 1888, Ibid. pp. 1667, 1729.

[2] Heffter, § 200; Hall, § 98; Lawrence, § 146.

From what has been said in respect to the rule that a government is not required to receive a particular person in a diplomatic capacity, it follows that the recall of a minister, whose conduct has been such as to render his presence no longer acceptable, may be requested, or even demanded, by the government to which he is accredited; indeed, if the occasion be one of sufficient emergency, it may dismiss such an offender, and, if need be, expel him from its territory.[1]

It has already been explained that the government of a state is the organ through which it communicates with other powers. In such intercourse with other states a government may communicate directly, through its ministry of foreign affairs, or through ambassadors selected by the proper governmental authority in accordance with its constitution and laws.

Classification of Diplomatic Agents. Heffter makes the following classification of these agents of intercourse:

(*a.*) Public ministers. These are clothed with a public and official character, and are sent by the sovereign authority of a state to a foreign government, as its general diplomatic representatives, or to undertake special negotiations. They may have either a permanent or temporary character.

(*b.*) Diplomatic agents, charged with similar duties, but without public or official character.

(*c.*) Commissioners, appointed for special purposes, as to locate and mark boundaries, to adjust international differences, or to carry into effect special clauses of treaties. The members of this class do not communicate directly either with a foreign sovereign or with his ministers.

[1] The Government of the United States has felt obliged, upon more than one occasion, to take action with a view to expel, or secure the recall, of an offending minister. For references to such cases, see I Dig. Int. Law, §§ 84, 106; VII Opinions of Attorney-General, p. 367; I Amer. State Papers (Foreign Relations), pp. 141, 709; III Ibid. pp. 318ff, 352ff, 355ff; Lawrence's Wheaton (ed. of 1863), p. 437; II Schouler's History of the United States, p. 108; II Madison's Writings, pp. 422, 444, 449, 451, 453, 469, 474. The correspondence in relation to the most recent case of expulsion — that of Lord Sackville, the ambassador of Great Britain — see United States Foreign Relations, 1888, pp. 1667–1730. See also I Dig. Int. Law, § 84.

(*d.*) Consuls charged with the supervision of commercial interests.[1]

Rank of Ambassadors. The absence of a well-defined rule by which to determine questions arising as to the powers and dignities of the different classes of diplomatic agents gave rise to great confusion, especially at the beginning of the present century. To remedy this the representatives of the European powers assembled in Congress at Vienna, in 1815, agreed upon a classification of public ministers, and recommended the preparation and adoption, in each state, of rules to regulate their precedence. The arrangement proposed at Vienna,[2] as modified by the action of the Congress of Aix-la-Chapelle,[3] in 1818, has received such general sanction as to entitle it to consideration as a rule of international law. In accordance with its provisions diplomatic agents are now arranged into four classes:

(*a.*) Ambassadors, ordinary and extraordinary, legates and nuncios.

(*b.*) Envoys, ministers, or other diplomatic agents accredited to sovereigns.

(*c.*) Ministers resident, accredited to sovereigns.

(*d.*) *Chargés d'affaires*, and other diplomatic agents accredited to ministers of foreign affairs (whether bearing the title of minister or not), and consuls charged with diplomatic duties.[4]

Ambassadors of the first class are alone clothed with the representative character; they have special prerogatives, and are entitled to special honors, as they represent the sovereign in his *personal* character. Members of the other classes represent his affairs only. In general the immunities to which ministers are entitled depend upon their letters of credence.

[1] Heffter, § 201; Lawrence, Int. Law, § 143; Dana's Wheaton, § 211, note; Hall, §§ 96, 98.

[2] Lawrence, § 143; Dana's Wheaton, § 211, note; Heffter, § 208; I Dig. Int. Law, § 88; Vattel, liv. iv. chap. vi. §§ 69–71

[3] Lawrence, § 143; Dana's Wheaton, § 211, note; Heffter, § 208.

[4] Bluntschli, § 171; Dana's Wheaton, § 211, note; Hall, p. 298; Heffter, §§ 208, 219; I Dig, Int. Law, § 88.

Those accredited to sovereigns are entitled to the immunities of ambassadors, those accredited to ministers of foreign affairs are not.[1]

Titles of Ambassadors. The titles of ambassadors are regulated by the municipal laws of the states which they represent. The terms *ordinary* and *extraordinary* at first determined the character of the diplomatic employment of the ministers to whom they were applied. They have now no special meaning. Legates and nuncios are the representatives of the pope at foreign courts. Legates have the rank of cardinal, and represent, to a certain extent, his spiritual as well as his temporal authority. Nuncios represent him in the latter capacity only. In determining the rank and titles of ministers sent to foreign courts, the principle of reciprocity prevails, and a state sends to another a representative of the same class that it receives. Several ministers may be maintained at the same court, and a single person may represent a state at several courts.[2]

Manner of Sending and Receiving Ambassadors. To

[1] Article 4 of the "Reglement sur le rang entre les agens diplomatiques" adopted at the Congress of Vienna in the protocol of March 19, 1815, contained the requirement that "diplomatic employés shall take rank, as regards each other, in each class from the date of the official notification of their arrival." It was held, in a discussion respecting the application of this article which arose among the diplomatic representatives accredited to the court of Spain in 1875, that the precedence of diplomatic employés did not depend upon the date of actual presentation, but upon the date of official notification of readiness to be presented. It was contended, however, that the term "arrivée," as used in the article, was restricted in its application to the case of each government; since a minister holding over might have been accredited to and received by some previous intruded, usurping, illegitimate, and odious dynasty or government, the recognition of whose previous rank would therefore implicate the legitimate dynasty or government in quasi admission of such previous assumption or intrusion, and would also be prejudicial to the rights of such foreign governments as had refused to recognize such usurpers or intruders, and had done so in the interest of legitimate and regular government. The weight of opinion seemed to be, however, that inquiries as to legitimacy should be disregarded, and the question of recognition be restricted to the fact of the existence of the government in every case.—United States Foreign Relations, 1875, p. 1105.

[2] Lawrence, Int. Law, §§ 141–144; Bluntschli, § 172; Heffter, §§ 201, 208.

enable a minister to be received in that character, he is provided by the sovereign or other chief executive authority of his own state with two important papers, called his *Letter of Credence* and *Full Power*. The Letter of Credence is addressed to the sovereign to whom he is accredited. It contains his name and title, confers upon him the diplomatic character, and serves to identify him as a public minister, but does not authorize him to enter upon any particular negotiation.[1] The Full Power authorizes him to act as the general diplomatic representative of his government at the court to which he is accredited. It describes the limits of his authority to negotiate, if such there be, and upon it the validity of his acts as a minister largely depends. Ambassadors who represent states at Congresses and Conferences, or as members of International Courts, or Boards of Arbitration, are not usually provided with Letters of Credence. They bear Full Powers, under the authority of which they act, and copies of them are exchanged among the different members of the board or conference.[2]

Reception of Ambassadors. An ambassador or minister accredited to a sovereign, upon arriving at his station, forwards a copy of his Letter of Credence to the Minister of Foreign Affairs, and requests an audience with the sovereign. At this audience, which may be either public or private, his Letter of Credence is presented, and complimentary speeches are usually exchanged.[3] He may then enter upon the performance of his duties.

[1] "Among the several characters established by custom, it rests with the sovereign to determine with what particular one he chooses to invest his minister; and he makes known the minister's character in the credentials which he gives him for the sovereign to whom he sends him. Credentials are the instrument which authorizes and establishes the minister in his character with the prince to whom they are addressed. If the prince receives the minister, he can receive him solely only in the quality attributed to him in his credentials. They are, as it were, his general letter of attorney, his mandate patent, *mandatum manifestum*."—Vattel, liv. iv. chap. vi. § 76.

[2] II De Martens, pp. 84–86; Hefftter, §§ 209, 210; Bluntschli, §§ 183–190; Lawrence, § 147; I Dig. Int. Law, § 85; I Twiss, §§ 212–216.

[3] For many years the Chinese emperor refused to accord to foreign ambassadors and ministers accredited to his court the personal au-

Duties of Ambassadors. The duties of a public minister are not susceptible of exact description. Some of them are regulated by international law, and some by the municipal law of the ambassador's state. They depend upon the importance of the power to which he is accredited, upon the amount of intercourse, commercial and otherwise, existing between it and the state which he represents, and, to some extent, upon the difference in their systems of government. He is expected to keep his government informed upon all questions of general interest, and to advise it of any change in the government, constitution, or state policy of the country in which he is resident. It is also his duty to make proper representations in behalf of subjects of his own state who may stand in need of protection, to secure a remedy for injuries which they may have received, or, in case they exceed his jurisdiction, to inform his government fully of the facts in each case in order that proper measures of redress may be taken. In general he represents the interests of his state, and those of its individual subjects, in the country to which he is accredited. That he may do so effectively at all times, and under all circumstances, he is bound by every consideration of honor and duty to scrupulously abstain from all interference in the internal affairs of the state to which he is accredited.[1]

Diplomatic Language. Every state has a right to employ its own language in its communications to other powers, and

dience to which by long established usage they believed themselves entitled. After some preliminary correspondence on the part of the powers interested an understanding was reached by their representatives at Pekin, and the matter of an audience was again presented to the Chinese Government in a joint note submitted to Prince Kung the prime-minister of China. After considerable discussion the request of the foreign ministers was acceded to, and a personal audience with the emperor was had on June 29, 1873.—United States Foreign Relations, 1873, part i. pp. 149–201. See also Lawrence, Int. Law, § 147; I Twiss, §§ 212–216.

[1] A foreign minister should correspond with the Secretary of State on matters which interest his nation, and not through the press of our country. He has no authority to communicate his sentiments to the people of the United States by publication in manuscript or print. —I Opinions of Attorney-General, p. 74; Heffter, pp. 425–432; I Dig. Int. Law, §§ 89–91, 107–107b; Klüber, §§ 197–201.

must recognize a corresponding right, on the part of other states, to a similar use in all communications addressed to itself. Until the beginning of the eighteenth century Latin was in general use as a convenient neutral language. The treaties of Nimeguen, Ryswick, and Utrecht, and the Quadruple Alliance, concluded at London in 1788,[1] were drawn up in Latin. The official acts of the Holy See are still written in that language. French, however, has gradually displaced Latin as the diplomatic language, and, to a great extent, still retains that character. The treaties of Vienna, in 1815, those of 1833, concerning the separation of Belgium from Holland, and the treaty of Paris, in 1856, were drawn up in French.[2]

The Functions of Ambassadors, how Suspended and Terminated. The functions of an ambassador, and consequently his official character, may be suspended, and may, or may not, be terminated:

(*a.*) As a result of some difference or misunderstanding between the two powers, not resulting in war.

(*b.*) Upon the occurrence of important political events, which render the continuance of his mission improbable; as a sudden or violent change in the constitution or form of government, in either state. Such a suspension continues until it is removed, by proper authority, in the state in which it originated.[3]

A mission may be terminated:

(*a.*) By the death, or by the voluntary or constrained abdication of one or both sovereigns. This, however, only in case the ambassador represents the sovereign in his personal capacity.[4]

[1] Heffter, p. 433.

[2] II Phillimore, § 43; Heffter, § 235; II De Martens, § 179; I Ortolan, p. 101; Dana's Wheaton, § 158; Klüber, § 114.

[3] According to the public law of the monarchies of Europe, the authority of ministers, and perhaps of international commissioners, expires on the death, deposition, or abdication of the prince; but not so as between the American republics, in which the executive power is permanent and continuous, without regard to the governing person, and there is no interruption of the authority or renewal of the credentials of their public ministers on a change of President for whatever cause, provided such President continues to represent and exercise the appointing power of the government.—VII Opinions of Attorney-General, p. 582; Heffter, p. 414; I Dig. Int. Law, § 87.

(*b.*) By the withdrawal, or cancellation, of his Letters of Credence and Full Power.

(*c.*) By his recall at the outbreak of war; or upon the completion of the duty which he was appointed to perform, the expiration of his term of office, or upon his promotion or removal to another sphere of duty.

(*d.*) By his removal, which may be voluntary, or forced by the government to which he is sent.

(*e.*) By death.[1]

When the functions of an ambassador cease for any cause his departure is attended by formalities similar to those observed at his reception. He requests an audience with the sovereign, at which he presents his letters of recall. If normal relations exist between the two governments, formal expressions of regret are exchanged at this interview. In strictness his functions and privileges cease when his letter of recall has been presented. Through courtesy, however, the immunities which he has enjoyed during his period of residence are extended to him until he passes the frontier of the state on his homeward journey.

The Privileges and Immunities of Ambassadors. To the successful and efficient performance of an ambassador's duties the most complete personal independence and freedom of action are necessary. This immunity lies at the foundation of the system, and has been most jealously guarded and preserved since the beginning of modern diplomacy. It was recognized by the nations of antiquity, and is insisted upon as a necessary preliminary to intercourse with those Eastern countries whose standards of civilization differ so widely from our own.[2] It is illustrated by the swiftness with which nations

[1] II De Martens, p. 160; Bluntschli, §§ 227–240; Heffter, § 224; I Halleck, pp. 304–309; Klüber, §§ 227–230; II Phillimore, §§ 237–242.

[2] "The inviolability of a public minister — or the protection to which he has a more sacred and particular claim than any other person, whether native or foreigner —is not the only privilege he enjoys; the universal practice of nations allows him, moreover, an entire independence of the jurisdiction and authority of the state in which he resides. * * * It is a matter of no small importance that he have no snares to apprehend— that he is not liable to be diverted

have always resented offences against the persons of their ministers and diplomatic agents.[1]

The Principle or Fiction of Exterritoriality. From the *fact* of the inviolability of an ambassador's person, the *fiction of exterritoriality* has been deduced to account for and explain the various exemptions which public ministers enjoy in foreign countries. This principle has been defined, and its limitations have been pointed out, elsewhere.[2]

This immunity is both personal and territorial. Personal in that it involves an exemption of his person from the civil and criminal jurisdiction of the state in which he is resident; territorial in that his residence or hotel is presumed to be a part of the territory of the state which he represents. In strictness his privileges and immunities become effective when he enters

from his functions by any chicanery—that he have nothing to hope, nothing to fear, from the sovereign to whom he is sent. In order, therefore, to the success of his ministry, he must be independent of the sovereign authority and of the jurisdiction of the country, both in civil and criminal matters."—Vattel, liv. iv. chap. vii. § 92; Klüber, § 203; Wheaton, § 224; I Dig. Int. Law, §§ 92–94; Heffter, § 212.

The act of February 1, 1876 (19 Stat. at Large, p. 2), contains the requirements that, in the several provisions of the Revised Statutes relating to the privileges and immunities of ambassadors and public ministers, the word "minister" shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word "consul" shall be understood to mean any person invested by the United States with, and exercising, the functions of consul-general, vice consul-general, consul, or vice-consul.

[1] An affront to an ambassador is just cause for national displeasure, and, if afforded by an individual citizen, satisfaction is demandable of his action. It is usual for nations to complain of insults to their ambassadors, and to require the parties to be brought to punishment. — Spanish minister's case, I Opinions of Attorney-General, p. 71, Lee (1797). An ambassador or other representative of one nation residing in another is entitled to be treated with respect, and especially ought not to be libelled by any of the citizens. If he commits any offence, it belongs, in our country, to the President to take notice of it, and not to any individual citizen.—Ibid. Any malicious publication tending to render another ridiculous, or to expose him to public contempt and hatred, is a libel; and in the case of a foreign public minister the municipal law is strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence but also from insult.—Case of British minister, I Ibid. p. 52, Bradford (1794).

[2] See pp. 74–90.

upon the performance of his diplomatic duties. It is usual, however, to recognize them as existing so soon as he enters the territory of the state to which he is accredited. The exemption which an ambassador enjoys extends to his family, to the secretaries and other *attachés* and employees of the legation, and to his domestic servants. Some question has arisen as to the precise extent of this immunity in the case of servants, especially when they are natives of the country in which the minister is resident.[1] Unquestionably any privilege which a servant may have "is not the privilege of the servant himself, but of the ambassador, and is based on the ground that the arrest of the servant might interfere with the comfort or state of the ambassador."[2]

[1] Dana's Wheaton, §§ 224–243, notes 128–130.

[2] II Phillimore, p. 227. The laws of the United States which are intended to secure the privileges and immunities of ambassadors and public ministers will be found in the following sections of the Revised Statutes:

SEC. 4062. Every person who violates any safe-conduct or passport duly obtained and issued under authority of the United States, or who assaults, strikes, wounds, imprisons, or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court.

SEC. 4063. Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a state, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.

SEC. 4064. Whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the law of nations, and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court.

SEC. 4065. The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the Dis-

Immunity from Criminal Jurisdiction. As respects criminal jurisdiction, an ambassador is exempt from criminal prosecution, of every sort, during the entire period of his residence

trict of Columbia, who shall upon receipt thereof post the same in some public place in his office.

SEC. 4066. All persons shall have resort to the list of names so posted in the marshal's office, and may take copies without fee. — See also I Dig. Int. Law, §§ 92, 93; Foreign Relations of the United States, 1879, pp. 374, 375.

The laws of the United States which punish those who violate the privileges of a foreign minister are equally obligatory on the state courts as upon those of the United States, and it is equally the duty of each to quash the proceedings against any one having such privileges.—*Ex parte* Cabrera, I Washington, p. 232. The injured party may seek his redress in either court against the aggressor, or he may prosecute under the twenty-sixth section of the law. — Ibid. The mode of redress for a person privileged from arrest when arrested is by motion to the court from which the process issued. — Lyell *vs.* Goodwin, 4 McLean, 29. For injuries done by private persons to the representatives of foreign governments, the Government of the United States affords redress through its judicial tribunals. The Executive Department has no power to redress such injuries.—IX Opinions of Attorney-General, p. 7. The certificate of the Secretary of State, dated subsequently to the assault and battery, is the best evidence to prove the diplomatic character of a person accredited as a minister by the Government of the United States. — The United States *vs.* William Liddle, 2 Washington, 205. An indictment under the act of 1790 (I Stat. p. 118; R. S. § 4062), for offering violence to the person of a public minister is not a case "affecting ambassadors or other public ministers and consuls," within the second section of the third article of the Constitution.—United States *vs.* Ortega, 11 Wheaton, 467. Any malicious publication tending to render another ridiculous, or to expose him to public contempt and hatred, is a libel; and in the case of a foreign public minister the municipal law is strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence but also from insult. — Case of British minister, I Opinions of Attorney-General, p. 52, Bradford (1794). An affront to an ambassador is just cause for national displeasure, and, if offered by an individual citizen, satisfaction is demandable of his nation. It is usual for nations to complain of insults to their ambassadors, and to require the parties to be brought to punishment. —I Opinions of Attorney-General, p. 71. An ambassador or other representative of one nation residing in another is entitled to be treated with respect, and especially ought not to be libelled by any of the citizens. If he commits any offence, it belongs, in our country, to the President to take notice of it, and not to any individual citizen.—Ibid. The arrest (of servants of public ministers) is regulated by act of Congress; entering a public minister's house to serve an execution will either be absorbed in the arrest, as being necessarily associated with it, if that be found criminal, or, if an arrest be admissible, must be punished, if at all, under

at a foreign court. A crime committed against the person of an ambassador, except in the way of self-defence, is given an aggravated character,[1] and is punished with exceptional sever-

the law of nations. — Ibid. p. 26. The arrest of the domestic servant of a public minister is declared illegal by the act concerning crimes (I Stat. p. 117; R. S. § 4063). All process for the purpose is annulled, and the persons concerned in the process are liable to fine and imprisonment. — Case of Van Berckel's servant, I Opinions of Attorney-General, p. 26, Randolph (1792). If, however, the domestic be a citizen or inhabitant of the United States, and shall have contracted, prior to his entering into the service of the minister, debts still unpaid, he shall not take the benefit of the act. — Ibid. Nor shall any person be proceeded against under the act for such arrest, unless the name of the domestic be registered in the Secretary of State's office and transmitted to the marshal of the district in which Congress shall reside.—Ibid. Domestic servants of a foreign minister are not liable to the ordinary tribunals of the country for misdemeanors.—United States *vs.* Lafontaine, 4 Cranch, Cir. Ct. 173. Any person who executes process on a foreign minister is to be deemed an officer under section 26 of the act of 1790 (I Stat. p. 117; R. S. § 4064.) — United States *vs.* Benner, Baldwin, 234. To support an indictment under this law it is not necessary that the defendant should know the person arrested to be a foreign minister.—Ibid. A foreign minister cannot waive his privileges or immunities; his submission or consent to an arrest is no justification.—Ibid. An assault committed by him may be repelled in self-defence, but does not justify an arrest on process. — Ibid. An attaché to a foreign legation is a public minister within the act of Congress.—Ibid. A certificate by the Secretary of State, under seal of office, that a person has been recognized by the Department of State as a foreign minister, is full evidence that he has been authorized and received as such by the President of the United States.—Ibid. In England the statute making process against ambassadors and public ministers void was passed after the arrest of the Russian ambassador for debt.—7 Anne, chap. 12, § 3. It has been held in England that the privilege operates to protect the ambassador to the extent of preventing him from being proceeded against in a manner that may ultimately result in coercion in respect to his person, or the seizure of such of his personal effects as are necessary to his comfort and dignity. — Taylor *vs.* Best, 14 C. B. 521. For the subjection of real property and, in certain cases, personal property owned by public ministers to obligations imposed by the local law, see I Dig. Int. Law, § 95; for English cases, see Novello *vs.* Toogood, 1 B and C. 562; Gladstone *vs.* Musurus Bey, 1 H. and M. 495.

[1] "An act of violence done to a private person is an ordinary transgression, which, according to circumstances, the prince may pardon; but, if done to a public minister, it is a crime of state, an offence against the law of nations; and the power of pardoning, in such case, does not rest with the prince in whose dominions the crime has been committed, but with him who has been offended in the person of his representative. If, however, the minister has been insulted by persons

ity by the municipal laws of every state.[1] The only exception to the immunity which a minister enjoys in this respect would arise from his own misconduct. For any minor violation of propriety the government to which he is accredited may signify its displeasure, either privately to the minister himself, or to his government in the diplomatic way. For a more serious offence, amounting to crime, his recall may be demanded. If

who were ignorant of his character, the offence is wholly unconnected with the law of nations, and falls within the class of ordinary transgressions."—Vattel, liv. iv. chap. vii. § 82.

[1] Heffter, § 214; Bluntschli, §§ 209–213; Hall, § 50; Dana's Wheaton, § 225, 226, note 129; Lawrence, Int. Law, § 150; I Halleck, pp. 278–287; Klüber, § 211; I Dig. Int. Law, §§ 92, 93a. Where the chargé d'affaires had a large party at his house, and a transparent painting at his window at which a mob which had collected took offence, the defendant fired two pistols at the window, his intention being to destroy the painting without doing injury to the person of the minister or of any one. The prisoner was indicted for an assault upon the chargé d'affaires of Russia, and for infracting the law of nations, by offering violence to the person of the said minister.—United States *vs.* Hand, 2 Washington, 435. Held, the law of nations identifies the property of a foreign minister, attached to his person or in his use, with his person. To insult them is an attack on the minister and his sovereign, and it appears to have been the intention of the act of Congress to punish offences of this kind.—Ibid. To constitute an offence against a foreign minister, the defendant must have known that the house on which the attack was made was the domicile of a minister, otherwise it is only an offence against the municipal laws of the state.—Ibid. The law is the same in the case of a defendant charged with an assault of a minister as when charged with the same offence against a citizen; and if the minister gave the first assault the defendant will be excused for the subsequent battery though he was a minister.—United States *vs.* William Liddle, 2 Washington, 205. Upon an indictment for an assault committed on the chargé d'affaires of a foreign government, proof that the person assaulted is received and recognized by the Executive of the United States is conclusive as to his public character, and that he is entitled to all the immunities of a foreign minister.—United States *vs.* Ortega, 4 Washington, 531. If a foreign minister commits the first assault, he forfeits his immunity so far as to excuse the defendant for returning it.—Ibid. It is no defence upon such indictment that defendant was ignorant of the public character of the minister.—Ibid. Domestic servants of a foreign minister are not liable to the ordinary tribunals of the country for misdemeanors.—United States *vs.* Lafontaine, 4 Cranch, C. Ct. 173. It is a breach of diplomatic privilege for an officer of justice to enter the dwelling-house of a secretary of legation, and there to seize a runaway slave; and for so doing the officer will be removed.—United States *vs.* Jeffers, 4 Cranch, C. Ct. 704.

the request be not acceded to, he may be summarily dismissed, or notified to quit the territory of the offended state. For crime of an aggravated sort, amounting to treason, or a treasonable conspiracy against the government, he is deemed to have forfeited his immunity, and may be forcibly expelled; but he may never be subjected to criminal prosecution in the state in which he resides in the character of ambassador.[1]

Immunity from Civil Jurisdiction. A similar immunity from civil jurisdiction is sanctioned by the general usage of nations. An ambassador, in his public character, is exempt from the service of process, and suits against him can only be brought in the courts of his own country. His furniture and other movable property are exempt from taxation, and from seizure in execution of judgment. This immunity, however, only attaches to him in his diplomatic capacity. It does not extend to any other interests he may have in the state in which he is resident; and, as a merchant, trustee, or executor, his property is subject to the local law. If he waives his diplomatic privilege and submits himself to the jurisdiction of the local courts by appearing in them as a party to a cause, he must abide by their decision. It has been held, however, that a judgment against him can only be satisfied out of property held by him in his private capacity.[2]

[1] In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishments than those inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.—Schooner *Exchange vs.* McFaddon, 7 Cranch, 116 [139]. During the reign of Queen Elizabeth three ambassadors of foreign powers were detected in plots for the assassination or dethronement of the queen. In two cases, those of the Scotch and Spanish ambassadors, the offenders were ordered to leave the kingdom; in the other no action was taken. For other cases, see Walker, Int. Law, part ii. chap. iii. § 26; II Phillimore, §§ 156–171.

[2] Heffter, § 215; Bluntschli, §§ 218–221; Dana's Wheaton, §§ 224–226; I Dig. Int. Law, §§ 92, 93; I Twiss, §§ 216, 217; Klüber, §§ 209–214.

Immunity of an Ambassador's Hotel. If the principle of exterritoriality were of invariable application, it would follow that, since his house and premises are held to be part of the territory of the state which he represents, his jurisdiction over them would be complete and exclusive as regards the authority of the government to which he is accredited. This is not the case, however. If a crime be committed by a person of his suite against a foreigner, the offender may be arrested or detained by the minister, and held subject to the extradition process, or sent home for trial; or, with the consent of the minister's government, he may be surrendered for trial in the local courts. A crime committed by one person of his suite against another is justiciable only in the courts of the minister's country. Nor can an ambassador's house be made an asylum for criminals. The surrender of an offender who takes refuge there may be demanded, and if denied he may be forcibly removed. The privilege of an ambassador is thus seen to be, to a certain extent, negative in character. The law of nations secures to him such personal immunity as is necessary to the proper and adequate performance of his duties. It also guarantees to him such honors and privileges as befit the representative of a sovereign state.[1] But no such

[1] Even the house of a foreign minister cannot be made an asylum for a guilty citizen, nor is it apprehended a prison for an innocent one. And, though it be exempt from the ordinary jurisdiction of the country, yet, in such cases, recourse would be had to the interposition of the extraordinary power of the state.—I Opin. Atty.-Gen. p. 47; Vattel, liv. iv. ch. ix. § 118; Klüber, § 208; Bluntschli, § 200; Calvo, § 555; Hall, § 52; II Phillimore, §§ 204, 205; Heffter, § 216.

The chargé d'affaires appointed by Dom Miguel, of Portugal, commenced an action in trover in the state court of Pennsylvania, in 1829, against the late chargé to recover the archives and property of the legation, and the late chargé was arrested and imprisoned in default of bail. On a motion to quash the process it was held:

1. That the recognition of a foreign minister is conclusive evidence of the authenticity and validity of his credentials.

2. Where a diplomatic representative announces the cessation of his functions by reason of a change of authority in his country, and obtains his passports, he has not waived his privilege as a returning minister, and the process should be quashed.

3. Such a suit, as in this case, is no evidence that the sovereign has deprived the chargé of his privilege, even if it were competent so to do.

privilege or immunity attaches to him when committing a crime or doing a wrongful act, and he may be restrained, if need be by force, if he attempts to commit a crime against the person or property of another. In the exercise of the right of self-defence he may be resisted, and wounded, or even killed, by the person whom he has assaulted, and this without giving cause of complaint to the government which employs him.

Cases Against Public Ministers, where Triable. While the immunities accorded to public ministers are of the most extensive and important character, amounting, in fact, to an

—Torlade *vs.* Barrozo, 1 Miles (Pa.), 366. The attorney who issued the capias was thereupon indicted under the act of Congress and tried in the Federal court. The case went to the Supreme Court of the United States on a difference of opinion, and a *nolle prosequi* was entered by direction of the President.—United States *vs.* Phillips, 6 Peters, 776.

Nitchenoff's Case. In 1867, one Nitchenoff, a Russian subject, entered the hotel of the Russian ambassador in Paris, in the absence of the ambassador, and killed one of the legationary attachés. The French police were called in and arrested the offender. The Russian ambassador demanded the surrender of Nitchenoff with a view to his being sent to Russia for trial. The French Government declined to honor this demand on the ground that the hotel of an ambassador did not furnish an asylum to a stranger committing an offence within its premises. For other cases, see Hall, § 53, and II Phillimore, pp. 192–227. The persons and household goods of foreign ambassadors, and of those who are attached to their respective legations, are exempt from lawful arrest, seizure, or molestation, as well by the law of nations as by the act of April 30, 1790, section 28 (1 Stat. 118; R. S. § 4062.) It is, therefore, unlawful for the keeper of a hotel in Washington, with whom an attaché of the legation of France is a boarder, to oppose by force, in any manner, the removal therefrom of any of his personal effects.—V Opin. Att.-Gen. p. 69. Yet it is not incumbent on the Secretary of State to interfere in such cases. The act of Congress, which denounces the act and prescribes the penalty, refers them to the judiciary.—II Ibid. p. 290. A foreign minister cannot waive his privileges or immunities; his submission or consent to an arrest is no justification.—U. S. *vs.* Benner, Baldwin, 234. An assault committed by him may be repelled in self-defence, but does not justify an arrest on process.—Ibid. An attaché to a foreign legation is a public minister within the act of Congress.—Ibid. A certificate by the Secretary of State, under seal of office, that a person has been recognized by the Department of State as a foreign minister, is full evidence that he has been authorized and received as such by the President of the United States.—Ibid.

almost complete exemption from the operation of the local laws, it does not follow that they are exempt from all legal responsibility, or that there are no courts which have jurisdiction over them. They are in all respects amenable to the jurisdiction of the courts of their own country, and before those courts they may be required to appear as parties defendant in causes of a civil or criminal character.[1]

Immunity of Public Ministers in States Other than Those to which They are Accredited. A similar, though less extensive, immunity attends the correspondence of a public minister with his government, and his transit to and from his place of official residence.[2] Although the privileges of ambassadors are, in strictness, only available in countries to which they are formally accredited in a diplomatic capacity, they are entitled, through comity, to immunity from interference and annoyance while in the territories of third states while *en route* to, and returning from, their respective posts of duty.[3]

Privilege of Religious Worship. The privilege of religious worship according to a prohibited form, or one different from that prevailing in the country to which an ambassador is accredited, is now generally accorded, subject to certain restrictions as to publicity. Increasing tolerance, however, in all matters of religious opinion has detracted somewhat from the advantage of the concession, as it has deprived the restrictions of much of their former significance and force. A certain jurisdiction is also conceded to ministers in the perform-

[1] Lawrence, Int. Law, § 151; Dana's Wheaton, §§ 224–243; Hall, §§ 50–53; Bluntschli, §§ 191–226; I Dig. Int. Law, § 94; II Phill. § 158.

[2] I Dig. Int. Law, § 97; II Phillimore, pp. 208–211; Hall, § 99; Lawrence, Int. Law, § 150; Heffter, § 206; Klüber, § 204.

[3] Complaint was made by the United States Government that its telegraphic communications with its minister in Guatemala were subjected to censorship in San Salvador in 1890. The act was disclaimed by the latter government.—For. Rel. of the U. S. 1890, pp 113, 114. The United States Minister to Turkey complained, in the year 1893, that his communications with the State Department had been opened by Turkish officials.—For. Rel. of the U. S. 1893, pp. 620, 624. See also Vattel, liv. iv. chap. vii. §§ 82–85, 125; I Twiss, § 222.

ance of certain legal acts in behalf of their fellow-subjects, such as formalizing and registering marriages, births, and deaths, and other acts of like character.[1]

Exemption from Customs Dues, etc. Foreign ministers are usually exempted from the payment of customs duties upon articles imported by them, and intended for their personal use. Such articles are subject to the usual inspection, and precautions calculated to prevent an abuse of the privilege are justifiable. To avoid such abuses some states permit a certain amount to be imported free of duty, and collect the usual dues upon articles imported in excess of the authorized amount or value. The privilege of an ambassador does not exempt him from the observance of the police and sanitary regulations of the city in which his official residence is situated. For a violation of such ordinances, however, he can only be proceeded against in a diplomatic way. Nor does his privilege exempt him from the payment of tolls, or of postage upon such of his correspondence as may be intrusted to the ordinary mails for delivery.[2]

Legationary Asylum. Although the rule of international law that the residence of a minister may not be used as an asylum for criminals is well settled, the practice of furnishing legationary asylum to persons charged with political offences, and to officials overthrown by revolutionary movements, still exists in some states of the West Indies and of Central and South America. Such asylum has been offered in recent times by the ministers and, in a limited number of cases, by the consuls of Great Britain and the United States in those countries. In the case of the diplomatic representatives of the latter power, however, such asylum has been afforded in opposition to the policy and instructions of the government. It has been justified solely on the ground of humanity, and

[1] Bluntschli, §§ 203–208; Heffter, § 213; I Halleck, pp. 299, 300; Klüber, §§ 215, 216; I Twiss, § 221; II Phillimore, § 209; Hall, p. 181, note.

[2] Klüber, § 205; I Halleck, p. 298; Bluntschli, §§ 222, 223; Heffter, § 217; I Dig. Int. Law, § 95; Dana's Wheaton, § 242, note 131; I Twiss, § 220.

has usually been afforded only in cases of individuals whose lives were in actual danger from mob violence, and has been limited in point of time to a particular day, as to the sailing of a particular steamer. With a view to the suppression of the practice, the Government of the United States suggested, in 1870, that the great powers should combine in instructing their diplomatic agents to refuse such asylum in the future; but this effort did not meet with success.[1]

Military and Naval Attachés. The practice of assigning officers of the army and navy of a state to duty as military and naval attachés at its principal legations, though relatively recent in origin, has become quite general. These officers are detailed and assigned to duty by the head of the state which they represent, and are placed on a similar footing, in respect to privilege, as is occupied by the other attachés of the legation. Their duties are neither uniform nor well defined; but consist in the observation of current military events in the state to which they are accredited. They make such reports as are required by the regulations or orders of the state which they represent in a military capacity.[2] There is no fixed rule as to the channels through which these reports shall be submitted, although, as the minister is responsible for the conduct and policy of the legation and for the official conduct of his attachés and subordinates, it would seem proper that such papers should pass through his hands. As a matter of fact, however, this is not always, nor even usually the case. As it is a part of the duty of attachés to obtain military information in the state in which they reside, there have been instances in which considerable friction has arisen in respect to the character and contents of the reports submitted by them to their governments, and the sources from which the informa-

[1] Hall, § 52. See also, for recent cases, Foreign Relations of the United States, 1876, pp. 338–344; 1878, p. 443; 1879, pp. 570, 576, 582; 1885, p. 207; 1886, p. 530; 1890, p. 522; 1895, pp. 245, 246; 1896, p. 381; Klüber, § 208; Vattel, liv. iv. chap. ix. §§ 118, 119; Bluntschli, §§ 200, 202; I Dig. Int. Law, §§ 104–107.

[2] Foreign Relations of the United States, 1879, p. 906; Dientz *vs.* La Jara, Trib. Civ. de la Seine, July 31, 1878; Bar, p. 617.

tion has been obtained, in consequence of which the recall of particular attachés has been demanded.

In time of war, military and naval officers are sometimes specially assigned, or accredited, to the belligerent powers, with a view to their being permitted to accompany armies in the field, in order to observe the details of the military operations. These officers, unless formally attached to the legation at the capital of the belligerent state, are entirely without the diplomatic character. Their functions are restricted to the observation of the military operations, in which they are forbidden to assist or take active part. If captured, not having the enemy character, they cannot be placed in the status of prisoners of war; but they may be detained by the belligerent into whose hands they fall if their release, immediately after capture, would lead to a disclosure of his plans, or convey to the enemy any information as to his strength, positions, or movements.

CONSULS: CONSULAR JURISDICTION

History of the Consular Function. Consuls are persons appointed by the government of a state to represent its commercial interests, and those of its subjects, in the principal ports of other nations.

The practice of maintaining consular representatives in foreign ports and commercial cities dates back to the very beginning of modern commerce. It was developed among the commercial cities of the Mediterranean, and grew out of the exigencies and necessities of their intercourse with the Levantine cities, whose forms of government and systems of law were radically different from their own. The ships of foreign merchants were held to be navigated under the jurisdiction of the nation whose flag they carried; and the general practice was for vessels engaged in long sea voyages, some of which occupied a period of not less than three years, to have on board a magistrate, whose duty it was to administer the law of the country of the flag among all on board, not merely while the vessel was on the high seas, but while she was in a foreign port,

loading or unloading cargo. This magistrate was termed the *alderman* in the ports of the North and Baltic seas, while in the Mediterranean ports he was designated by the familiar name of *consul*, and was the precursor of the resident commercial consul, who continues in the present day to exercise within merchant ships of his own nationality, notwithstanding they are within the territorial jurisdiction of another state, a portion of the personal jurisdiction formerly exercised by the ship's consul. The exercise of this consular jurisdiction requires no fiction of exterritoriality to support it. Its limits are either regulated by commercial treaties, or, where it has originated in charter privileges, it is now held to rest upon custom.[1]

The institution had become fully established, in much the same form as it now exists, at the end of the twelfth century, at which time Venice was represented in the East by consuls at Constantinople, Aleppo, Jerusalem, and Alexandria. The Eastern Empire maintained a consul at Marseilles, and foreign consulates had long been established and recognized at the port of Barcelona, in Spain. These early consuls performed many of the duties of modern ambassadors, and had something of their inviolable character. As a result of the general establishment of permanent missions in Europe in the seventeenth century, an important change was made in the consular function in all the states of the West. The diplomatic duties were transferred to the class of public ministers, to whom the character of inviolability was attached; and there remained to the consuls a class of duties of a commercial character, closely resembling those which they now perform. In the Levant, however, where no permanent missions were established, consuls continued to enjoy their old

[1] Consuls, as international commercial agents, originated in the colonial municipalities of the Latin Christians in the Levant, which municipalities were self-governing through their "consuls," the ancient title of municipal magistrates in Italy.—VII Opinions of Attorney-General, p. 342. See also an article on the history of the consular office in the English *Law Magazine* for February, 1876; I Twiss, § 223; I Halleck, pp. 310, 311.

powers and privileges; these, to a great extent, they still retain.[1]

Classification of Consuls. Consular officials are usually classified into consuls-general, consuls, vice-consuls, and consular agents, and each state, by its municipal law, determines the manner of appointment, the tenure of office, and the special duties of its consular representatives in foreign ports. In this way a state may confer upon its consuls such power and jurisdiction as it wishes them to exercise, provided such exercise of jurisdiction is sanctioned by the usage of nations, or has been conceded by treaty. In the Christian states of Europe and America consuls have none of the privileges and immunities of ambassadors. In the Levant, however, in many Asiatic and African ports, and in the islands of the sea, they perform the duties and are entitled to the exemption of public ministers.

By whom Appointed. Consuls are appointed by the sovereign, or chief executive authority of the state which they represent, subject to such restrictions in the matter of citizenship, character, and qualifications as are determined by its municipal laws. They are provided with commissions, or letters of appointment, which are submitted, through their ministers, to the Department of Foreign Affairs of the state in which they are to perform consular duty. If that government consents to recognize them in the capacity of consuls, an *exequatur* is issued, upon the receipt of which they are authorized to enter upon the performance of their duties. For misconduct or crime, or for acts in excess of their jurisdiction, the exequatur may be withdrawn or revoked at any time; and if this action be taken for just and sufficient cause, the government of the state which the consul represents will have no reasonable ground of complaint.[2]

[1] II Phillimore, pp. 258–262; I Halleck, pp. 310, 311; Heffter, §§ 244, 245; Dainese *vs.* Hale, 91 U. S. 13; I Lorimer, chap. vii.

[2] This procedure is by no means uncommon. In October, 1793, the exequatur of the French consul at Boston was withdrawn for having taken part in an attempt to rescue a vessel out of the hands of the United States marshal, which had been brought in as a French prize,

Manner of Appointment in the United States. The members of the United States Consular Establishment are arranged into three principal classes—consuls-general, consuls, and commercial agents.[1] They are appointed by the President with the consent of the Senate. They receive fixed salaries, augmented in certain cases by fees, and those whose salaries exceed one

but upon which process had been served at the suit of the British consul, who claimed that she had been illegally captured in the neutral waters of the United States.—Hildreth, History of the U. S. vol. iv. p. 437; I Dig. Int. Law, §§ 113, 114, 115, 116. Another and more remarkable case occurred in 1861. In order to protect British commerce, Her Majesty's Government was desirous that the Confederate states should observe the last three articles of the Declaration of Paris; accordingly Mr. Bunch, the British consul at Charleston, S. C., was instructed to communicate this desire to the Confederate authorities. The United States thereupon demanded that Mr. Bunch should be removed from his office, on the ground that the law of the United States forbade any person, not specially appointed, from counselling, advising, or interfering in any political correspondence with the government of any foreign state in relation to any disputes or controversies with the United States. It was contended that Mr. Bunch should have known of the existence of this law, and should have communicated it to his government before obeying their instructions. It was also urged that the proper agents to make known the wishes of a foreign government were its diplomatic, and not its consular, officers. On these grounds Mr. Bunch's exequatur was withdrawn.—Boyd's Wheaton, p. 305; United States Diplomatic Correspondence, 1862, p. 1.

[1] Section 1690 Revised Statutes; I Dig. Int. Law, §§ 113, 114. The duties of consular officers of the United States are determined in part by municipal law and in part by treaty stipulations, and by the requirements of the law of nations.[a] They are required to act in behalf of owners of stranded vessels,[b] to receive from the masters of American vessels, upon their arrival in port, their registers, sea-letters, and Mediterranean passports, and to return them when a proper clearance has been obtained, by such masters, from the port authorities.[c] They are required to make reclamation of deserters from merchant vessels, and, when treaty stipulations authorize it, to demand from the local authorities such assistance as they may need to effect their capture and return.[d] They are also required to certify invoices of merchandise which it is proposed to import into the United States, and to require satisfactory evidence, by oath if need be, of their correctness.[e] They are to keep lists of seamen shipped and discharged by them, and of vessels arrived and

[a] Halleck, vol. i. pp. 315, 316, gives a full list of the legal and acting titles of United States consuls. For fuller information as to their powers and duties, see the official Regulations Prescribed for the Consular Service of the United States, Washington, December 31, 1896. [b] Revised Statutes of the United States, § 4238. [c] Ibid. §§ 4309, 4310. [d] Ibid. §§ 4598–4600. [e] Revised Stat. of the United States, § 2852.

thousand dollars per annum are forbidden to engage in trade. Consular positions of the highest class can only be filled by citizens of the United States. Their general duties are ascertained and fixed by law. The President is empowered to define the territorial limits of the different consulates, and to make all needful regulations for the consular service.[i]

The Duties of Consuls. It is the duty of the consular representatives of a state to watch over its commercial interests, to supervise the execution of commercial treaties, and to assist, by interference and counsel, such of their fellow-citizens as may be sojourning, either permanently or temporarily, at the place of their official residence. They are authorized to adjust disputes arising on board vessels of their own nation, to hear and act upon complaints of members of their crews, to issue and countersign passports to their fellow-citizens, to authenticate the judgments of foreign courts by their consular seal, and, if the local laws permit, to act as administrators upon the estates of decedents of their own nationality. They are also authorized to register births, marriages, and deaths, and may solemnize marriages when the contracting parties are of the same nationality as themselves, unless forbidden to do so by the municipal law of their own states, or that of the state in which they officially reside. They are permitted to exercise a certain voluntary jurisdiction over their fellow-citizens in cases

cleared, with an account of the nature and value of their cargoes.[f] They are to care for destitute seamen, and to cause the same to be transported to the United States,[g] and are to procure and transmit to the State Department such authentic commercial information respecting the country in which they reside as may be required by the head of that department.[h] They are authorized to solemnize marriages between persons who would be permitted by law to marry if resident in the District of Columbia,[i] and may take possession, in certain cases, of the personal estates of any citizen of the United States who may die within their consular jurisdiction leaving no legal representatives. They may sell such of this property as is of a perishable nature to pay debts due from the estate, transmitting the residue to the Treasury of the United States.[k]

[i] Section 1752 Revised Statutes. This power was last exercised by President Cleveland in the preparation of a volume of Consular Regulations, bearing date December 31, 1896.

[f] Ibid. § 1708. [g] Ibid. § 4577. [h] Ibid. § 1712. [i] Ibid. § 4082. [k] Ibid. § 1709.

with which the local law has no concern; but no contentious jurisdiction can be exercised over their fellow-countrymen without the express permission of the state in which they reside, and no Christian state has, as yet, permitted the criminal jurisdiction of foreign consuls.[1]

Privileges of Consuls. Although consuls, as such, are not clothed with the diplomatic character, and are, for that reason, not entitled to any of the peculiar immunities which attach to diplomatic office, they nevertheless enjoy certain privileges which are sanctioned by the general usage and practice of nations, and are, therefore, recognized as rules of international law. They are entitled in general to such privilege and freedom of movement as are necessary to enable them to properly perform the duties intrusted to their charge; they are also presumed to be entitled to all the powers and privileges which their predecessors have enjoyed, and may properly claim any

[1] II Phillimore, § 249. No foreign power can, of right, institute or erect any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by and be in pursuance of treaties. The admiralty jurisdiction, which has been exercised in the United States by consuls of France, not being so warranted, is not of right.—Glass *vs.* Sloop *Betsey*, 3 Dallas, 6. The principles of international law, as they are recognized in Europe, afford no warrant for the exercise of judicial powers by consuls, but the rights and duties of those functionaries depend, both for their authority and extent, upon the treaties subsisting between the governments exchanging this species of commercial agent.—II Opin. Att.-Gen. p. 378. Foreign consuls are entitled to no immunities beyond those enjoyed by foreigners coming in a private capacity to this country, except that of being sued and prosecuted exclusively in the Federal courts. Whenever a foreign consul is guilty of illegal or improper conduct, he becomes liable to a revocation of his exequatur, and to be punished according to our laws, or he may be sent back to his own country, at the discretion of our government.—II Ibid. p. 725. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to subjects of his own country, but it is not competent for him, without the special authority of his government, to interpose a claim on account of the violation of the territorial jurisdiction of his country.—The *Anne*, 3 Wheaton, 435. A consul of a foreign power, though not entitled to represent his sovereign in a country where the sovereign has an ambassador, is entitled to intervene for all subjects of that power interested.—Robson *vs.* the *Huntress*, 2 Wallace, Jr., 59.

right exercised by a consul of another nation, unless such right is based upon treaty stipulations. They are generally regarded as exempt from arrest for political reasons, and are not subject to personal imposts, or liable to the performance of personal services; they are also exempt from the quartering of troops, and, in general, from such restrictions as are calculated to interfere with the efficient performance of their consular duties. They are usually permitted to place their national flags and coats-of-arms over their offices, and in most states their archives are regarded as inviolable.[1]

They may engage in business, if the municipal law of their own country permits them to do so, and may be prohibited from so doing by the same authority. They are in all respects amenable to the civil and criminal jurisdiction of the state in which they are resident, unless exempted therefrom by treaty stipulations. They may sue or be sued in its courts, they are subject to service of process, both civil and criminal, and judgments obtained against them may be satisfied out of their private property.[2]

[1] II Phillimore, § 246; I Twiss, § 223; Laurence, Int. Law, § 148; Hall, § 105; vol. xx. Revue de Droit International, pp. 229–245, 305, 609; xxii. ibid. pp. 336-348; I Lorimer, chap. vii.; I Halleck, p. 315.

[2] Hall, § 105, p. 318; I Halleck, pp. 315–324; II Phillimore, pp. 296–300; I Twiss, pp. 378–380; I Wildman, p. 130; Manning, pp. 113, 114; I Dig. Int. Law, §§ 120–123. A consul is not entitled by the law of nations to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides. — Gettings *vs.* Crawford, Taney, 1. A consul is not a public minister, nor entitled to the privileges attached to the person of such an officer.—I Opin. Att.-Gen. p. 41. Foreign consuls and vice-consuls are not public ministers within the law of nations, or the acts of Congress, but are amenable to the civil jurisdiction of our courts; and in the case of the Genoese consul (2 Dallas, 297) it was held that they were not privileged from prosecutions for misdemeanors.—I Opin. Att.-Gen. p. 406. Foreign consuls are entitled to no immunities beyond those enjoyed by foreigners coming in a private capacity to this country, except that of being sued and prosecuted exclusively in the Federal courts. Whenever a foreign consul is guilty of illegal or improper conduct, he becomes liable to a revocation of his exequatur, and to be punished according to our laws, or he may be sent back to his own country, at the discretion of our government.—II Ibid. p. 725. A consul is not privileged from legal process by the general laws of nations, nor is

Halleck holds that they may be punished for their criminal offences by the laws of the state in which they reside, or sent back to their own country for trial, at the discretion of the government which they have offended. A distinction is made, however, between personal offences and official acts done under the authority, or by the direction, of their own governments. The latter are matters for diplomatic arrangement between the respective states, and are not justiciable by the local courts.[1] Consuls are subject to local taxation and to the payment of customs dues. Their places of residence are regarded as their domicile to the extent that, in time of war, their goods on the high seas are subject to belligerent capture if their domicile is such as to give them the hostile character.

Consular Jurisdiction. In certain Eastern countries, whose standards of law and morals differ materially from our own, an extensive jurisdiction, both civil and criminal, is exercised by the consuls of the principal Western powers. It was obtained in the first instance by treaty stipulation, and by later treaties has been modified and extended, from time to time, as the ex-

the French consul-general by the consular convention between the United States and France of 1788 (Pub. Trs. 219—annulled by act of 1798—1 Stat. 578.)—Letombe's case, I Op. Att.-Gen. p. 77, Lee (1797). In a suit brought against a consul-general of France for transactions of a public nature, and in which he acted as the commercial agent of his country, the President of the United States has no constitutional right to interpose his authority, but must leave the matter to the tribunals of justice.—Ib. Foreign consuls are bound to appear only in the Federal courts; the Constitution and laws, contemplating the responsibility of consuls, having provided these tribunals, in exclusion of the state courts, in which they shall answer.—Villavaso's case, I Ibid. 406, Wirt (1820). The President cannot interfere in such a case, but where a privilege is claimed a plea may be entered to the jurisdiction of a state court, or, if in a national court, the consul may bring the question before the Supreme Court.—Ib.

[1] I Halleck, p. 313. For cases in which insults to, or attacks upon, consuls have been made the subject of complaint in the cases of the British consul at Imoa in 1873, see For. Rel. U. S. 1874, pp. 102–105, 142, 143, 157–164; Ibid. 1875, part i. pp. 127, 128; the American consul at Acapulco, Ibid. 1587, pp. 406–409; Ibid. 1878, p. 580; Ibid. 1879, p. 802. As to immunity of consular archives, see vol. xx. Revue de Droit Int. p. 505; for cases of asylum in consulates, see case of Daniel Poso, For. Rel. U. S. 1875, part i. p. 57; see also Ibid. 1876, p. 321; Ibid. 1877, pp. 398, 399.

igencies of commercial intercourse made such changes either necessary or desirable. The effect has been to withdraw foreigners almost completely from the operation of the local laws, and to subject them to the jurisdiction of the consuls of their respective states.[1]

The extent of this jurisdiction is defined, and its exercise regulated, by treaties with the several Christian powers who maintain consular representatives at their commercial ports. These treaties are carried into effect by the municipal laws of the signatory states, which determine, at the treaty port, or within the limits of the treaty concession, the extent and character of the consular jurisdiction. "This jurisdiction is subject, in civil cases, to an appeal to the superior tribunals of their own country. The criminal jurisdiction is usually limited to the infliction of pecuniary penalties, and, in offences of a higher grade, the consular functions are similar to those of a police magistrate, or *juge d'instruction.* He collects the documentary and other proofs, and sends them, together with the prisoner, home to his own country for trial."[2] Such jurisdic-

[1] Historically, it is undoubtedly true, as shown by numerous authorities quoted by Mr. Warden in his treatise on "The Origin and Nature of Consular Establishments," that the consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the changed circumstances of Europe, and the prevalence of civil order in the several Christian states, have had the effect of greatly modifying the powers of the consular office; and it may now be considered as generally true that, for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the states which the consuls represent. — Dainese *vs.* Hale, 91 U. S. 13. The exterritoriality of foreign consuls in Turkey and other Mohammedan countries is entirely independent of the fact of diplomatic representation, and is maintained by the difference of law and religion, being but incidental to the fact of the established exterritoriality of Christians in all countries not Christian.—VII Opinions of Attorney-General, p. 342. Rights of private exterritoriality having ceased to exist in Christendom, foreign consuls have ceased, mostly, to be municipal magistrates of their countrymen there; but they still continue not only international agents but also administrative and judicial functionaries of their countrymen in countries outside of Christendom. — Ibid.; I Ortolan, 285.

[2] Boyd's Wheaton, p. 152; De Steck, Essai sur les Consuls, sec.

tion was obtained for consuls of the United States by treaties made at different times with Turkey, China, and Japan, and with Siam and Madagascar. Suitable laws have been passed by Congress to give effect to their provisions. By the act of July 1, 1870, the operation of the statute was extended "to any country of like character with which the United States may hereafter enter into treaty relations."[1] The jurisdiction conferred upon United States ministers and consuls by the act of June 22, 1860, is both civil and criminal, but is restricted in its exercise to citizens of the United States. Consuls are authorized to hear, and finally decide, civil causes in which the amount involved, exclusive of costs, does not exceed five hundred dollars. When the amount exceeds that sum, or in his opinion the case involves legal perplexities, the consul is authorized to summon not less than two, nor more than three, citizens of the United States, who are to be selected, by lot, from a list previously submitted to the minister and approved by him. If the consul and his advisers concur in opinion, their decision is final. If they fail to agree, or if the amount at is-

vii. §§ 30–40; Pardessus, Droit Commercial, pt. vi. tit. vi. chap. ii. § 2; chap. v. §§ 1, 2, 3. A consular court is a court of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel or petition; otherwise it will be insufficient.—Steamer *Spark vs.* Lee Choi Chum, 1 Sawyer, 713.

[1] Act of July 1, 1870 (§ 4129, Rev. Stat.). It cannot be contended that every consul, by virtue of his office, has power to exercise the judicial functions claimed in this case; for it is conceded that this is not the case in Christian countries. And while, on the other side, it is also conceded that in pagan and Mohammedan countries it is usual for the ministers and consuls of European states to exercise judicial functions as between their fellow-subjects or citizens, it clearly appears that the extent to which this power is exercised depends upon treaties and laws regulating such jurisdiction. The instructions given by the British Foreign Office to their consuls in the Levant, in 1844, as quoted by Mr. Phillimore, do not claim anything more.—Dainese *vs.* Hale, 91 U. S. 13. Where consular courts are clothed with criminal jurisdiction, the rule applies that a sentence of imprisonment cannot be legally executed beyond the territorial jurisdiction of the court which pronounced it, unless authority there to execute the sentence is conferred by the legislature.—Case of three convicts at Smyrna, XIV Opinions of Attorney-General, p. 522, Williams (1875). See also I Dig. Int. Law, § 125; Foreign Relations of the United States, 1878, p. 518; and an article by Sir Travers Twiss in vol. xxv. of the Revue de Droit International, pp. 213–220.

sue exceeds five hundred dollars, either party may appeal to the minister. In China and Japan the decision of the minister is final in all suits when the amount at issue does not exceed two thousand five hundred dollars. Cases involving a greater amount may be appealed to the United States Circuit Court for the district of California, whose decision in the case is final.

Consuls are also authorized to hear and decide criminal cases, and, in the event of conviction, to impose penalties of not more than ninety days' imprisonment, or a fine not exceeding five hundred dollars. In cases not involving a higher penalty than one hundred dollars' fine, or sixty days' imprisonment, their decision is final. Whenever the consul is of opinion that an important question of law is involved in the decision of a case, or deems a greater punishment necessary than he is authorized to inflict, he may summon as advisers, in cases not capital, not less than one, nor more than four, American citizens to assist him in his decision. In cases involving capital punishment not less than four such assistants must be summoned. In the event of disagreement the case, with evidence and opinions, is forwarded to the minister for decision. His decision is final, except in cases arising in China and Japan, from which an appeal may be taken, as in civil cases, to the United States Circuit Court in California. The jurisdiction of the minister is appellate, except in capital cases, or when the consul is a party; and, finally, ministers and consuls are enjoined to exert all their official influence to induce litigant parties to adjust their differences by arbitration.[1]

A somewhat similar jurisdiction is exercised by the consuls of other powers in the East.[2]

[1] Sections 4083 – 4128 Revised Statutes of the United States.

[2] II Phillimore, pp. 312 – 316; Walker, Sci. Int. Law, p. 230; I Halleck, pp. 330–343; Bluntschli, § 269; Heffter, §§ 244–248; I Twiss, § 223; Hall, p. 321, note; Lawrence, Int. Law, § 148; Treaties and Conventions of the United States, 1776–1887, note on consuls, pp. 1279–1285.

References. Most existing works upon the subject of diplomacy are of foreign origin. Many of them either appeared originally in French, or are accessible in French translations. The most important of these are, for the period of Grotius, Nys, "Origines de la Diplomatie," and, for its later history and practice, Ch. de Martens, "Le Guide Diplomatique," and "Causes Célèbres du Droit des Gens" (1827), and the "Nouvelles Causes Célèbres," published by the same author in 1844. See also the "Traité Complet de Diplomatie," par un Ancien Ministre; Schuyler, "American Diplomacy"; and the "Rights and Duties of Diplomatic Agents," by E. C. Grenville-Murray. The following works upon the functions and duties of consuls may be consulted with advantage: "Dictionnaire ou Manuel Lexique du Diplomate et du Consul," by Baron F. de Cussy; Miltitz, "Manuel des Consuls"; Borel, "De l'origine et des Fonctions des Consuls"; Mensch, "Manuel pratique de Consulat"; Neumann, "Handbuch des Consulatswesens"; and Henshaw's and Warden's works on the duties of consuls. As the exercise of consular jurisdiction is based upon treaty stipulations, it is necessary, in conducting inquiries upon this subject, to consult the treaties themselves. For this purpose, see the collections referred to at the end of chap. viii. For a very full account of the diplomatic and consular policy of the United States, see Schuyler, "American Diplomacy and the Furtherance of Commerce." For a general discussion of the subject of consular jurisdiction, see vol. x. *Revue de Droit International*, pp. 285–322; xi. ibid. pp. 45–79; xv. ibid. pp. 88–91, 279–281, 502–503; xxvii. ibid. pp. 313–326; I Twiss, §§ 223, 253–264; II Phillimore, §§ 272–277; IV Pradier-Fodéré, §§ 2122–2138; Bluntschli, §§ 216, 269; Heffter, § 247; I Halleck, pp. 331–347; Dana's Wheaton, § 110, note 68; II Int. Law Digest, § 125.

CHAPTER VIII

TREATIES AND CONVENTIONS: EXECUTION, RATIFICATION, INTERPRETATION

Power of a State to Make Contracts and Agreements. In its capacity as a body politic a state, as will presently be seen, has many of the attributes of a corporation, including the power to make contracts and agreements. Sovereign states, however, have the added power, not possessed by individuals or corporations, of entering into a class of contractual obligations called public treaties or conventions. Contracts, in the ordinary acceptation of that term, may be made by a state with private persons, whether citizens or aliens, or with public or private corporations, but these instruments are not treaties, nor are they, in all respects, the same as contracts between private persons or corporations.[1]

Purpose of Treaties. Treaties may therefore be defined as compacts or agreements, entered into by sovereign states for the purpose of increasing, modifying, or defining their mutual duties and obligations.[2] To secure the observance of the generally accepted rules of international law, treaties are not necessary, certainly among Christian states. They become so only when states find it either necessary or expedient to amend or modify their existing obligations, to define usages that are

[1] Klüber, § 141; Heffter, § 81; Dana's Wheaton, § 252; Vattel, liv. ii. ch. xii. §§ 152, 153; I De Martens, §§ 46, 47. "Public treaties can only be made by the superior powers, by sovereigns who contract in the name of the state. Thus conventions made between sovereigns respecting their own private affairs, and those between a sovereign and a private person, are not public treaties."—Vattel, liv. ii. chap. xii. § 154.

[2] Vattel, liv. ii. ch. xii. § 152; II Ferguson, § 130; I De Martens, § 47; Woolsey, § 101; I Twiss, §§ 224–231; I Halleck, pp. 227–229.

not clear, to secure concerted action looking to the abandonment of unjust or oppressive practices, or to obtain general sanction in behalf of improved methods, or the general acceptance of desirable reforms.

The Right of Making Treaties. The right of making treaties is one of the essential attributes of sovereignty, and there can be no surer test of a semi-sovereign or dependent state than is deduced from the fact that its ability to enter into treaty relations has been abridged or destroyed. Dependent states, however, may retain the right, to a greater or less degree, depending upon the number and character of the sovereign rights which they have yielded, or of which they have been deprived. They frequently retain the right of making treaties of commerce and extradition, postal and customs conventions, and, in some cases, treaties of alliance and naturalization. The existence of such powers, however, would be inconsistent with any considerable degree of dependence on the part of the semi-sovereign state. In the German Confederation, as reorganized in 1815, a considerable degree of treaty-making power was reserved to the component states. The present German empire is a closer confederation, the imperial government having sole power to conclude treaties of peace or alliance, or treaties of any kind for political objects, commercial treaties, conventions regulating questions of domicile, emigration, and postal affairs, protection of copyright, and consular matters, extradition treaties, and other conventions connected with the administration of civil or criminal law.[1] The states of the American Union are forbidden to enter into treaties with foreign states; or to make agreements with other states of the Union, except with the consent of Congress.

Power of a State to Enter into Contracts with Individuals and Corporations. It has been seen that a state, in its capacity as a body politic, has many of the attributes of a corporation, including the power to make contracts and agree-

[1] Hall, p. 22; Hertslet, Map of Europe by Treaty, p. 1931; Dana's Wheaton, § 252; I Halleck, p. 227; II Phillimore, chap. vi.

ments. Contracts in the ordinary acceptation of the term may therefore be made by a state with private persons, whether citizens or aliens, or with public or private corporations. If the terms of such undertakings be not lived up to by the state, however, the individual who is wronged by such failure in respect to performance has not the same remedy that is applied where all the parties to the agreement are private persons—this, for the reason that sovereign states will not, as a rule, permit themselves to be sued in their own courts by private individuals, whether their own citizens or aliens. From the nature of the case the courts of the individual's state, he being an alien in respect to the government in default, are without jurisdiction to entertain a cause of action to which another sovereign state is a party. Permission to institute such suits is sometimes conferred upon courts endowed with jurisdiction for the purpose; but the existence of such a tribunal is not presumed in any state.[1] If the person wronged, however, be

[1] The United States by the establishment of the Court of Claims has given express statutory permission for suits to be brought against it; the cases in which such suits will lie being determined by the statute creating that tribunal.—Sections 1059 to 1093 Revised Statutes of the U. S. and the Acts of March 3, 1883 (22 Statutes at Large, 485); March 3, 1887 (24 Ibid. 406); June 27, 1898, (30 Ibid.), and July 1, 1898 (Ibid.), amendatory thereof. In conformity to the principles of reciprocity this privilege is extended to aliens in the following cases: By the proceeding known as a "petition of right," the British Government accords to citizens of the United States the right to prosecute claims against it. Accordingly, British subjects, if otherwise entitled, may recover, by process in our Court of Claims, the proceeds of captured and abandoned property, a privilege granted only to the citizens or subjects of such foreign governments as accord to our citizens the right to prosecute claims against such governments in their courts.—U. S. *vs.* O'Keefe, 11 Wallace, 178; Carlisle *vs.* U. S. 16 Ibid. 147. Under the laws of Prussia the *fiscus* represents the state, and any subject may sue the *fiscus* on contract before a court having like jurisdiction in actions between individuals. Judgment may be taken in such suit and execution issue. No discrimination is made against foreigners, save that they are required to give security for costs. Held, that an alien, a native of Hanover, which country had been incorporated into Prussia, was entitled to sue in the Court of Claims within the provisions of the act of July 27, 1868 (15 Stat. 243), which permitted the citizens or subjects of any government which accords to citizens of the United States the right to prosecute such claims in her courts, to recover the proceeds of captured or abandoned prop-

an alien he may present his claim through the foreign office of the state of which he is a citizen or subject.

The Treaty-making Power. That authority in a state in whom the right of entering into treaty relations is vested is called the *treaty-making power*. In states having a monarchical form of government the treaty-making power is one of the prerogatives of the crown; in states having republican institutions it is exercised by the executive, either directly or subject to the approval of some branch of the legislative department of the government.[1] This is the case in the United States. The constitution and laws of every state define the treaty-making power, and determine what restrictions, if any, are to be placed upon its exercise; and any agreements undertaken in excess of these limitations are unauthorized and void.[2]

erty.[a]—Brown's case, 5 Court of Claims Rep. 571. The Belgian Government, by its system of jurisprudence, holds the government amenable before the courts as an ordinary debtor, and accords to citizens of the United States the same right to prosecute claims against it in its courts as is accorded to individuals as between themselves. A subject of Belgium may, therefore, maintain a suit in the Court of Claims.—De Give's case, 7 Ibid. 517. By the laws of Switzerland a private citizen may maintain a suit against the state in the federal tribunal, if the subject of litigation is of the value of 3000 francs. This right taken in connection with the provisions of the treaty of November 25, 1850, securing to citizens of the United States liberty to prosecute and defend their rights before courts of justice, as native born citizens, permits a citizen of Switzerland to maintain an action before the Court of Claims.—Lobsiger's case, 5 Ibid. 687. In France a French subject may sue the government for real and personal property, and as American citizens are given the same privilege subject to the giving of security, French citizens may sue in the Court of Claims.—Rothschild's case, 6 Ibid. 204; Dauphin's case, Ibid. 221.

[a] The example of Prussia and other German states in subjecting the government to suits at the instance of private persons led to the establishment of the Court of Claims.—Brown's case, 5 Court of Claims Rep. 571.

[1] Bluntschli, §§ 404, 404 bis; I Halleck, p. 229; Klüber, § 142; Heffter, §§ 82, 84; Dana's Wheaton, § 265; Vattel, liv. ii. ch. xii. § 154.

[2] I Halleck, pp. 229–234; Heffter, §§ 82–84; Dana's Wheaton, §§ 265, 266, note 139. "Sovereigns treat with each other through the medium of agents or proxies, who are invested with sufficient powers for the purpose, and are commonly called plenipotentiaries. To their office we apply all the rules of natural law which respect things done by commission. The rights of the proxy are determined by the instructions that are given him: he must not deviate from them; but every promise which he makes in the terms of his commission, and within the extent of his powers, is binding on his constituent."—Vattel, liv. ii. chap. xii. § 156.

Nature and Extent. In the exercise of its treaty-making power, a state may acquire or dispose of territory, recognize the independence of new states, create servitudes, enter into alliances, or confer special privileges upon certain classes of aliens with respect to trade, residence, or occupation within its territories; it may also rectify boundaries, guarantee the territorial integrity of other states, provide for the neutrality of straits, ship-canals, and navigable rivers, and do any other acts not inconsistent with its sovereignty.[1] The right of a state to make contracts and agreements with individuals is subject, however, to the implied limitation that real property cannot be acquired by one state within the territorial limits of another, without the consent of such state shall first have been obtained by treaty stipulation. This for the reason that the occupation and possession of such lands would necessitate an exercise of sovereignty within the territory of the state within which such lands are situated.[2]

Conditions Essential to the Validity of Treaties. To the validity of a treaty it is essential: 1st. That the contracting parties should possess the power to enter into treaty engagements. 2d. The formal consent of the parties must be given, and this consent must be mutual, reciprocal, and free.[3] 3d. The subject of stipulation must not be opposed to morality and justice.

(*a.*) *Power of the Contracting Parties.* States which are parties to a proposed agreement must possess full treaty-making power as to its subject-matter. Dependent states cannot enter into agreements which are not authorized by their de-

[1] Bluntschli, §§ 404-408; I Halleck, p. 227; Klüber, § 146; I De Martens, § 56; Lawrence, § 152; II Phillimore, chap. vi.

[2] The United States Government cannot purchase a grant of land in, or concession of a right of way over, the territories of another nation as could an individual or private corporation, since, by the law of nations, one government cannot enter upon the territories of another or claim any right whatever therein. — The Chiriqui Improvement Company, IX Opin. Att.-Gen. p. 286, Black (1859).

[3] For the exceptional case of treaties of peace, in which the action of one party is always constrained, see paragraph b, post, and the article so entitled in the chapter relating to the laws of war.

pendent condition; and states which are members of a confederation cannot treat upon subjects which are reserved to the central government by the constitution of the confederacy. In the same manner the agents who are empowered to negotiate treaties may not exceed the limits laid down in their instructions or full powers. Any agreements entered into by them in excess of their authority are void, and ratification of them may be refused.[1] Such unauthorized agreements have been entered into at different times in the past, usually by military or naval commanders. They are called *sponsions*, and are invalid unless approved by the sponsor's government.[2]

(*b.*) *Consent of the Contracting Parties.* The consent of the participating states must be expressly and freely given. It must also be reciprocal; and one state, by its ratification or approval of a treaty, cannot constrain another to ratify it, or to regard its provisions as binding. In contracts between individuals, if either party act under constraint, the resulting contract is void. In the preparation of certain treaties, however, especially in treaties of peace and in a class of agreements arising in time of war called cartels and capitulations, one of the contracting parties acts under constraint of the most oppressive and humiliating kind; but this does not have the effect of invalidating the treaty. Private contracts may be set aside on the ground of the influence of fraud and unfair dealing, arising from their manifest injustice and want of mutual advantage. But no inequality of advantage, no *lesion*, can invalidate a treaty.[3]

(*c.*) *Possibility of Execution.* The conduct of states, like

[1] I Halleck, pp. 227–230; De Martens, Précis, § 48; Vattel, liv. ii. ch. xii. § 156; Klüber, § 142; Hefftter, § 84; Bluntschli, §§ 404, 404 bis; II Phillimore, § 48; Pomeroy, §§ 260–263; Hall, § 108; II Pradier-Fodéré, §§ 1058a–1068.

[2] I Halleck, p. 230; Klüber, § 142; Grotius, liv. ii. ch. cv. §§ 3, 16, 17; Vattel, liv. ii. ch. iv. § 211; Bluntschli, § 405; I De Martens, § 48; II Pradier-Fodéré, §§ 1066–1068; II Ferguson, p. 20.

[3] II Phillimore, §§ 49, 50; De Martens, Précis, §§ 49–51; Klüber, § 143; Grotius, liv. iii. ch. xx.; Hefftter, § 85; Bluntschli, §§ 407–409; Pomeroy, §§ 273–279; Hall, § 108; II Pradier-Fodéré §§ 1069–1079.

that of individuals, is regulated by well-known moral standards, from which they are bound not to depart. They are, therefore, prevented from making that a subject of treaty stipulation the execution of which is physically or morally impossible. Heffter holds those conditions to be morally impossible which are repugnant to moral order, or are opposed to the free development of nations.[1] Such would be stipulations tending to the destruction of a sovereign state, or the establishment of slavery. The same may be said of provisions which are opposed to previous treaties with other powers, or which are prejudicial to the sovereign rights or powers of a third state.

Binding Force of Treaties. Treaties entered into in conformity to these conditions are binding upon all the signatory parties, and they continue in force, whatever changes may take place in the internal affairs of the participant states. Changes of government in no way affect their binding force, and they cease to be obligatory only when states which are parties to them cease to exist. Their inviolability, even when not especially guaranteed, is the first law of nations.[2] Obligations created by treaty are of the most sacred character: their violation operates to release the other signatory party from his obligation, and, if persisted in, or not atoned for, is regarded as constituting a just cause for war.[3]

Manner of Negotiating Treaties. It has been seen that the right to make treaties is an essential attribute of sovereignty, and that the power to enter into such undertakings is

[1] Heffter, § 83; Klüber, § 144; Pomeroy, §§ 280–286; Hall, § 108; I De Martens, § 53; II Phillimore, chap. vi.; Lawrence, § 154.

[2] "The faith of treaties—that firm and sincere resolution, that invariable constancy in fulfilling our engagements, of which we make profession in a treaty—is therefore to be held sacred and inviolable between the nations of the earth, whose safety and repose it secures; and if mankind be not wilfully deficient in their duty to themselves, infamy must ever be the portion of him who violates his faith."—Vattel, liv. ii. chap. xv. § 220.

[3] Vattel, liv. ii. ch. xiv. §§ 163, 229–234; Klüber, §§ 145, 153; Heffter, § 94; Bluntschli, §§ 416–424; I Halleck, pp. 237–244; II Phillimore, §§ 52–55; Hall, §§ 114, 115; I De Martens, § 54; Lawrence, Int. Law, § 154.

vested, by the constitution of each state, in some branch of its government, designated for that purpose, called the treaty-making power. It is by this treaty-making power, therefore, acting directly, or by its duly authorized agents, that international agreements are negotiated.[1] In certain cases, however, the preparation of important treaties is intrusted to international deliberative bodies known as congresses or conferences.

Congresses and Conferences. These are bodies convened for the purpose of discussing questions of general interest, of adjusting international controversies, and of reconciling serious differences of opinion. They are composed of diplomatic agents of appropriate rank representing the states in whose relations the difference has arisen, together with the representatives of those powers whose interests are less directly affected, or compromised, by an existing situation, and who, being to some extent disinterested, are for that reason able to suggest methods of amicable adjustment. Congresses are called when the relations between two or more states have become so strained as to foreshadow the outbreak of war, or, after hostilities have ceased, with a view to effect a settlement of the questions to which the war has given rise. It is their function to ascertain the facts constituting a particular cause of difference, to discuss appropriate methods of relief, to suggest concessions, and, when an agreement has been reached, to make it operative by applying an appropriate remedy to the state of affairs which has given occasion for the meeting of the congress.

The conclusions of a congress or conference are generally embodied in treaties; at times, however, they are expressed in statements of international policy which have become known as "declarations." Of the former class the treaty of Berlin, framed by the Congress of Berlin in 1878, is an example; of the latter the Declaration of Paris, prepared by the Congress of Paris in 1856, in respect to the usages of war at sea, and the

[1] Heffter, §§ 86–89; Klüber, § 147; II Pradier-Fodéré, §§ 1061–1065, 1084–1099; II Dig. Int. Law, §§ 130–132; Lawrence, § 152; Hall, § 109.

Geneva Conventions of 1864 and 1868, in respect to the treatment of the wounded in time of war, are illustrations.[1]

Congresses receive their names, in some cases, from the places in which their sessions are held, in others from the subjects submitted to them for deliberation. If the agreement reached is one to which the general consent of nations is desired, so as to give it the force of a rule of international law, a clause prescribing the form and conditions of acceptance is embodied in the treaty or declaration in which it is contained.[2]

[1] Vattel, liv. ii. ch. xviii. § 330; II Ferguson, Int. Law, § 159. The terms "congress" and "conference" are not quite synonymous, although their powers and purposes are substantially the same. Conferences are somewhat more informal and tentative in character than congresses; if settlements are reached by them they are less frequently embodied in formal treaties or declarations than are those of general congresses. In the early part of the nineteenth century the distinction between the two bodies was believed to consist in the presence or absence of reigning sovereigns; their presence giving to a particular body the character of a congress; this distinction, however, is no longer maintained.

[2] Among the more important congresses which have been called in Europe, since the close of the Thirty Years' War, the following are the most important: the Congress of the Pyrenees, in 1659, for the settlement of certain south European questions; that of Oliva, in 1660, for the settlement of differences existing among the north European powers; that at Aix-la-Chapelle, in 1668, which terminated the wars between France and Spain in the Netherlands; that of Nimeguen, in 1678, which terminated the war between Holland and its allies against France; that of Ryswick, in 1697; at Paris, in 1763; and at Vienna, in 1815, which terminated general European wars; that at Aix-la-Chapelle, in 1818, which terminated the military occupation of France, which had been authorized by the treaties of peace in 1815; that at Vienna, in 1822, at which it was decided to intervene in the affairs of Greece. Two important European congresses have been held since 1850: that at Paris, in 1856, in respect to the usages of maritime war, and that at Berlin, in 1878, to effect a settlement of the questions to which the war between Russia and Turkey had given rise. On the American continent two congresses have been called since the beginning of the present century: one at Panama, in 1826, called on account of the declaration of the Monroe Doctrine by the United States; the other, a Congress of American Republics, called by the United States at Washington, in 1889 and 1890, to discuss questions connected with the commercial, administrative, and international relations of the states of the Western continent. Among the more important conferences of recent times may be noted those at London, in 1827 and 1837, for the discussion of the Eastern question and the pacification of the Levant; those held in London, in 1835 and 1839, in connection with affairs in

Preparation and Execution. In former times treaties were frequently negotiated by sovereigns in person;[1] at present they are usually entered into by ministers or plenipotentiaries, selected for the purpose by the proper municipal authority, and furnished with special full powers to act in behalf of their respective governments in the preparation and signature of the treaty. Preliminary negotiations are usually necessary, to determine the place and time of meeting and the conditions of representation. In the preparation of treaties of peace, or of agreements preliminary to such treaties, the neutrality of the place is secured by proper guarantees, and the personal security of the ambassadors is carefully provided for, not only at the sessions of the conference, but in their journeyings to and from the place of meeting. If the proposed agreement be one of general interest, the questions to be discussed are submitted to the powers in advance, the limits of negotiation are to some extent defined, and the number and character of representatives from each state is determined upon.

At the time appointed the representatives assemble and exchange their credentials and full powers. If several states are represented the conference is usually presided over by the principal minister of foreign affairs of the state in whose territory its sessions are held, or by the representative of the government with which the project originated. If need be, rules of procedure are agreed to at a preliminary session. Each power represented has a right to be heard, at length,

the Netherlands; those held in Vienna, in 1853, 1854, 1855, and 1856, in respect to the existing difficulties in southeastern Europe; those in Copenhagen, in 1856 and 1857, in respect to the navigation of the Danish Sounds; those called in London, in 1860 and 1864, to discuss the affairs of Greece and the discontinuance of the protectorate over the Ionian Islands; that held in London, in 1864, in respect to the settlement of the Schleswig-Holstein question; that of London, in 1867, in respect to the independence of the Grand Duchy of Luxembourg; and those of 1884 and 1885, in Berlin, in respect to the civilization and development of certain portions of Africa. — Pradier-Fodéré, Droit Int. Pub. vol. vi. pp. 229–289.

[1] The Holy Alliance of September 14 (26), 1815, was signed by the emperors of Austria and Russia and the King of Prussia. See also II Pradier-Fodéré, §§ 1061–1065.

upon all projects submitted for discussion which in any way affect its interests. The proceedings of each session are reduced to writing, and are properly authenticated, and the negotiation continues until an agreement has been reached, or until the impossibility of reaching such an agreement has become apparent. If questions are submitted to vote, nothing short of unanimous consent is sufficient to carry a measure of prime importance. After an essential article or stipulation has been adopted, the majority rule may prevail in the decision of questions of detail, or in accessory stipulations of minor importance.[1]

Language Used in the Preparation of Treaties. The language used in the preparation of treaties is subject to no fixed rule. Each party may, of right, insist upon the use of its own in the preparation of treaties, as in every other public act, or a neutral language may be adopted. In the former case there would be as many original copies as there were participant states. This would be true in form only, and not in fact, since one of these originals would furnish a model upon which the translation of the others would be based. Latin was formerly used, as a convenient and generally understood neutral language; it is still the official language of the Holy See. Towards the close of the seventeenth century it was replaced by the French, which became the general diplomatic language of Europe and America. It still retains that character to a higher degree than any other. Since the beginning of this century the greater part of the treaties which have been negotiated in Europe have been drawn up and signed in French. When France is one of the signatory parties, however, a clause is usually inserted to the effect that the use of that language is not to be regarded as constituting a precedent. Treaties to which England or the United States are parties are usually drawn up in both languages, in parallel columns. Treaties with the Ottoman Porte are drawn up in Arabic and French.[2]

[1] II Pradier-Fodéré, §§ 1061–1065, 1084–1099; Heffter, §§ 87–89; I Lorimer, pp. 260–269; Hall, § 109; II Dig. Int. Law, § 130; Klüber, §§ 200, 321; II De Martens, §§ 329, 330.

[2] II De Martens, § 179; II Philli-

Form and Signature. No rigorous form is necessary to be followed in the preparation of these instruments so long as the conditions of the agreement are clearly expressed, and assented to, by the signatory parties. Those entered into by Christian states begin with a solemn invocation to the Deity, though this is less frequently the case than formerly, especially in treaties of a commercial character. The first paragraph contains the name and designation of the contracting parties, followed by a clause stating, in general terms, the object of the treaty or convention, and by the names and titles of the ministers who have been empowered to represent the interested states in the negotiation. Next follows the body of the treaty, which is made up of stipulations mutually agreed to. It is divided into articles and clauses, the last of which fixes the terms of ratification and the date of signature. As many copies are prepared as there are contracting parties; and, in affixing the signatures and seals, the principle of the *alternat* is resorted to—that is, the representative of each state signs first the copy intended for his own government. The order of the other signatures is determined by lot, or alphabetically, the initial letter of each state determining the order of signature.[1]

Ratification of Treaties. On account of the magnitude and importance of the interests involved, treaties acquire binding force only when they have been ratified by the sovereign authority of the states which are parties to their operation, and all modern treaties contain provisions stipulating for such an exchange of ratifications. Ratification by one party does not constrain the others to a similar course; but the act of ratification, when completed by all parties, is retroactive in its operation, and gives effect to the treaty from the date of signature, unless the contrary is expressly stipulated.[2] There

more, pp. 61–63; Heffter, § 235; I Ortolan, p. 101; Dana's Wheaton, § 158; Klüber, § 114; II Dig. Int. Law, § 130.

[1] Bluntschli, §§ 417–424; Vattel, liv. ii. ch. xii. § 156; Klüber, §§ 100–106, 166–168; I De Martens, §§ 46, 47; II Ibid. §§ 331–334; I Halleck, p. 106; II Pradier-Fodéré, §§ 1084–1099; I Twiss, § 251; II Dig. Int. Law, § 130; Hall, § 109.

[2] Although it is true, as a prin-

has been considerable discussion as to whether ratification could be withheld, without lack of good faith, in treaties containing no such provision. Some Continental writers, following the rule of the Roman Law, have held that states are bound by the acts of their plenipotentiaries, when they have not exceeded their full powers and confidential instructions, as principals are bound by the acts of their duly authorized agents. Others justly make a distinction, in this respect, between treaties and contracts. Treaties are compacts between sovereign states, involving interests of the greatest magnitude, and often of the most intricate character, far transcending in importance the agreements of individuals, which, however complicated, are relatively simple in comparison. However full and minute the powers and instructions of ministers may be, they are still liable to errors of judgment or mistakes of policy, which can only be discovered and remedied by a careful and disinterested examination of their work, and a full criticism of its provisions from all points of view.[1]

Accession of Other States. Treaties sometimes contain provisions for the accession of third parties to their operation. The Declaration of Paris, the Treaty of Washington, and the Geneva Convention are examples of this practice. Such accession is had by a formal act on the part of the state desiring participation, by which it assumes, and agrees to be bound by, the obligations of the treaty from the date set forth in its

ciple of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature, and that in this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date, a different rule prevails where the treaty operates on individual rights. There, the principle of relation does not apply to rights of this character which were vested before the treaty was ratified, and in so far as it affects them it is not considered as concluded until there is an exchange of ratifications.—Haver *vs.* Yaker, 9 Wallace, 32; Vattel, liv. ii. ch. xii. § 156; II Pradier-Fodéré, §§ 1100–1119; Hall, § 110; I Halleck, p. 229; II Dig. Int. Law, §§ 131, 132.

[1] Bluntschli, § 419–424; Klüber, §§ 142, 326; I De Martens, § 48; II Ibid. §§ 291, 333; Lawrence, Int. Law, § 152; Hall, § 110; II Phillimore, pp. 75–77; II Dig. Int. Law, §§ 131, 131a; Heffter, § 87; Dana's Wheaton, §§ 256–262; II Halleck, pp. 229–233.

act of adhesion. This is especially the case in treaties having in view some modification or amendment of the rules of international law. The provisions of the Declaration of Paris, in 1856, have been acceded to by many states in Europe and America. England and the United States, in the Treaty of Washington, of 1871, agreed to use their influence to induce other nations to accept the principles of maritime law laid down in that instrument.[1] The arbitration convention concluded by the International Peace Conference at the Hague, in 1899, prescribes the conditions in accordance with which non-signatory states may become parties to the operation of that instrument.[2]

Termination of Treaties. Treaties cease to be binding or are abrogated:

1. With the mutual consent of the contracting parties. Such consent would ordinarily be expressed in a document of the same dignity and force as the original instrument which it is proposed to abrogate or modify.[3] The treaty of 1862 between Great Britain and the United States, in respect to the suppression of the African slave-trade, has been modified by three subsequent agreements on the same subject.[4]

2. When continuance is conditioned upon terms which do not exist.[5] The right to navigate a boundary river which has ceased to be navigable, or to fish in certain waters in which fisheries have ceased to exist are examples of this case.

3. Where either party refuses to perform a mutual stipulation.[6] This will be the case if but a single article has been violated, for the agreement was to observe the treaty in its entirety. In this event the other party is released from his obligations, and the instrument becomes void; or he may insist

[1] Klüber, § 161; Heffter, § 88; II Pradier-Fodéré, §§ 1131, 1145–1150.

[2] For text of this Convention see Appendix E.

[3] Treaties and Conventions of the United States 1776–1887, pp. 461, 472, 474.

[4] Wharton's Commentaries on American Law, § 161; Vattel, book ii. ch. xiii. § 205; Bluntschli, § 452; Klüber, § 164; Heffter, §§ 98, 99; Pradier-Fodéré, § 1210.

[5] Whart. Comm. Am. Law, § 161; Heffter, § 98; Bluntschli, § 456.

[6] Whart. Comm. Am. Law, § 161; Bluntschli, § 455; Klüber, § 165; Vattel, book ii. ch. xiii. § 202; Heffter, § 98.

upon a compliance with the stipulations of the treaty, and may demand indemnities for any injury that has resulted from such failure, on the part of the defaulting state, to observe its agreement. As treaties convert *imperfect* into *perfect* obligations, the injured party may resort to force to obtain redress for the injury which he has sustained.[1]

4. Where all the material stipulations have been performed.[2]

5. Where a party, having the option to do so, elects to withdraw.[3] The form and period of notice in such cases is usually made the subject of a clause or stipulation in the original treaty.

6. Where performance becomes physically or morally impossible.[4] A state, for example, enters into treaties of alliance with several powers, all engage in war at the same time; can it in such case comply with its stipulations? (a) if they engage in war with a foreign state; (b) if they engage in war with each other? Three states enter into a triple alliance; war breaks out between two of them; can the third state make good the terms of the alliance with both?[5]

7. When a state of things, which was the basis of the

[1] "As the engagements of a treaty impose on the one hand a perfect obligation, they produce on the other a perfect right. The breach of a treaty is, therefore, a violation of the perfect right of the party with whom we have contracted; and this is an act of injustice against him."—Vattel, liv. ii. chap. xii. § 164; II De Martens, § 265; I Halleck, pp. 440–442; III Phillimore, § 35.

[2] Whart. Comm. Am. Law, § 161; Bluntschli, § 450; Klüber, § 165; Vattel, book ii. ch. xiii. § 198; Heffter, § 99; I Halleck, p. 242; Hall, § 116.

[3] Whart. Comm. Am. Law, § 161; Bluntschli, § 454; Klüber, § 164; Heffter, § 99; I Halleck, pp. 242, 243; II Dig. Int. Law, § 137a.

[4] Whart. Comm. Am. Law, § 161; Bluntschli, § 459; Klüber, § 164; Heffter, § 98; I Lorimer, p. 264; Dana's Wheaton, § 275; Hall, § 116.

[5] All contracts between great states cease to be unconditionally binding as soon as they are tested by the "struggle for existence." No great nation will ever be induced to sacrifice its existence on the altar of fidelity to contract when it is compelled to choose between the two. The maxim "ultra posse nemo obligatur" holds good in spite of all treaty formulas whatsoever, nor can any treaty guarantee the degree of zeal and the amount of force that will be devoted to the discharge of obligations when the private interest of those who lie under them no longer reinforces the text and its earliest interpretation.—II Bismarck's Autobiography, pp. 273, 274.

treaty, and one of its tacit conditions no longer exists. A particular treaty is entered into by two states having in mind the continued existence of a particular form of government, the continuance of friendly relations; the existence, or absence of emigration, or the like. In this case as a particular state of affairs has changed or ceased to exist, the obligatory character of the instrument undergoes a corresponding change. The same case arises when one of the contracting parties ceases to exist as an independent state, or where the internal constitution of either state is so changed as to render the treaty inapplicable under circumstances different from those in view of which it was concluded.[1]

When the absorption of one state in the corporate existence of another results from treaty stipulations, the obligations of the state which ceases to exist are, as a rule, provided for in the treaty of cession; and pass, with its territories, to the state which has acquired them. When territory is lost as a result of conquest, the rule as to the passing of obligations is not uniform; in some instances debts have been assumed by the conqueror; in others, however, they have been repudiated; the amount of the debt being regarded as in the nature of an indirect contribution, levied by the conqueror upon the vanquished belligerent party.[2]

[1] Whart. Comm. Am. Law, § 161; Bluntschli, § 456; Klüber, § 165, note; Wheaton, part iii. ch. ii. § 10; Heffter, § 98. The treaty between the United States and Algiers, for example, was abrogated by the French conquest of that state in 1831; those with Hanover were similarly terminated by the absorption of Hanover in the kingdom of Prussia in 1866.—II Dig. Int. Law, § 137a.

[2] "In the same manner as a personal treaty expires at the death of the king who has contracted it, a real treaty is dissolved if one of the nations is destroyed—that is to say, not only if the men who compose it happen all to perish, but also if, from any cause whatever, it loses its national quality, or that of a political and independent society. Thus when a state is destroyed and the people are dispersed, or when they are subdued by a conqueror, all their alliances and treaties fall to the ground with the public power that contracted them."—Vattel, liv. ii. chap. xiii. §§ 203, 204. The rule respecting the passing of obligations, where territory is lost by conquest, in the extreme form in which it is stated by Vattel (liv. ii. chap. xiii. § 203), may, perhaps, be accepted as the rule of international law applicable to the case, subject, however, to the qualification above stated, that the failure of a conqueror

8. Where the stipulations of the treaty limit the period of its operation to a definite period of time, or to a fixed date. In this case, however, the agreement is said to be renewed if the parties avail themselves of its provisions subsequent to the date fixed for its expiration, such action constituting a tacit renewal of the treaty.[1] The treaties of 1785 and 1789 between the United States and Prussia; that of 1816 with Sweden; and that of 1824 with Colombia were terminated, in each case, at the expiration of a period of limitation prescribed in the treaty at the time of its negotiation.

Effect of War on Treaties. Treaties are suspended, and by some authorities are cancelled, by the occurrence of war between the contracting parties. They remain suspended during the period of the war, from the outbreak of hostilities until the negotiation of a treaty of peace.[2] The least effect of war is to interrupt peaceful relations; it therefore suspends the operations of all treaties not permanent in character, or which do not contemplate a state of war. The belligerent states resume friendly relations by the execution of a treaty of peace, and that treaty should determine to what extent treaty relations between them shall be resumed.

The following treaties, however, are not suspended by the outbreak of war between the contracting parties:[3]

to recognize and assume, or otherwise provide for, the obligations of the conquered state, is, in substance, the levy of a contribution, or indemnity, to the extent of the obligation repudiated; their omission from the treaty constituting a tacit or indirect imposition of the contribution in question.

[1] Bluntschli, § 451; Klüber, § 164; Vattel, liv. ii. ch. xiii. §§ 198, 200; I Halleck, p. 243; II Pradier-Fodéré, § 1213j; II Dig. Int. Law, § 137a; Hall, § 116; Pomeroy, § 289.

[2] Bas *vs.* Tingey, 4 Dallas, 37; Sutton *vs.* Sutton, 1 R. & M. 663; I Halleck, p. 242; Riquelme, Der. Pub. Int. liv. i. tit. i. chap. xv.; Hall, § 125; I Twiss, § 252; Woolsey, § 160; II Pradier-Fodéré, § 1215; Dana's Wheaton, § 275, note, p. 143. The termination of a treaty by war does not divest rights of property already vested under it. Treaties stipulating for a permanent arrangement of territorial and other national rights are at most suspended during war and revive at peace, unless they are waived by the parties, or new and repugnant stipulations are made. — Society, etc. *vs.* New Haven, 8 Wheaton, 464; Dana's Wheaton, § 275, note 143.

[3] I Halleck, p. 242; Dana's Wheaton, § 275, note 143; Heffter, § 141; Lawrence, Int. Law, 166.

(1.) Treaties of a permanent character, executed with full knowledge that war may occur, but given a permanent character by special stipulation.

(2.) Treaties entered into with a view of modifying or amending the rules of international law. Of this the Declaration of Paris, modifying the rules of maritime war, and the rules of war on land adopted by the peace conference at the Hague in 1899 are examples.

(3.) Treaties which contemplate the occurrence of war, and which come into effect only at the outbreak of hostilities. Such are treaties of alliance, or subsidy, or treaties regulating the operations of war, or defining contraband of war or guaranteeing the neutrality of a place, as a state, a city, or a ship-canal.

Classification of Treaties. Treaties are susceptible of classification, according to their subject-matter, into:

(*a.*) Treaties, properly so-called.

(*b.*) Cartels.

(*c.*) Capitulations.

(*d.*) Suspensions of arms, or truces.

Those of the first class, or treaties proper, are again subdivided into:

(*a.*) *Transitory Agreements or Conventions.* These are treaties the immediate execution of which is essential, and which are complete when the stipulated act has been performed; their effects only are permanent. Such are boundary conventions, treaties of cession, etc., corresponding to executed contracts at common law.

(*b.*) *Permanent Treaties.* These have continuing effect, and regulate the future relations and actions of the contracting parties. Treaties of friendship and commerce, of neutrality, extradition, and naturalization, and postal and customs conventions are examples of this class. These treaties may be of perpetual or limited duration. They may go into effect at a fixed date in the future, and may expire at a certain date, at the expiration of a certain period, or may be terminated at the will of either party, upon due notification. Their exist-

ence may be terminated by war, or they may come into effect only during hostilities between the interested parties.

Cartels are agreements entered into in time of war, for the exchange of prisoners. They are made by the commanders-in-chief of the belligerent forces, with the express or presumed consent of their governments. They may be transitory in character, or for the period of the war.[1] In some European states this term is applied to an agreement entered into in time of peace for the extradition of deserters from the military service.

Capitulations are agreements entered into, in time of war, by the commanders of hostile fleets or armies, for the surrender of a fortified place or fleet, or of a defeated army. The proposition may originate with the commander of the place, fleet, or army, or may be in the nature of a demand made upon him by the opposite, or successful, party. Upon either of these, as a basis, the capitulation is drawn up, the terms being modified, and the conditions of surrender determined, by the relative strength and resources of the belligerent parties. Every general commanding a besieged place or separate army is presumed to have authority to enter into arrangements of this kind, though his power may be restricted in some way by the sovereign authority of his own state. In such an event his action would be subject to the approval of his government, and he should notify his opponent that such is the case.[2] Cartels and capitulations are drawn up in the same form as treaties. The latter are signed first by the successful party.[3]

Objects of Treaties. The purpose or object of a treaty is, in most cases, sufficiently determined by its title. There are some, however, which require additional explanation.

Treaties of Alliance. These are agreements undertaken

[1] II Halleck, p. 354; III Phillimore, § 112.

[2] Vattel, liv. iii. chap. xvi. §§ 261–263; II Halleck, p. 348; III Phillimore, § 123.

[3] For a discussion of the duty of the commanding officer of a besieged place in the matter of surrender, see the chapter relating to the operations of war.

by two or more states with a view to secure concerted action for a certain purpose. They may be either temporary or permanent in character, and are entered into by states which are menaced by a common danger, or whose mutual interests are threatened. Alliances are created by treaty stipulations, and, however slight the concert of action may be, the resulting combination possesses some of the essential features of a league or confederation; the terms of the treaty of alliance determining the conditions of the union. Alliances may be equal or unequal, offensive or defensive, or both. Allied states may guarantee the continuance of a certain state of affairs in a third state, or in one of the states of the alliance. They are *defensive* when their object is to secure a common interest against aggression. Such alliances are conservative in character, and, by aggregating the influence and resources of a number, aim to secure respect for the sovereign rights of each of the component states. *Offensive* alliances are formed for the purpose of attacking a state, or league of states, either directly, or upon the occurrence of certain conditions. From their nature they are a constant menace to the peace of nations. The leagues organized to resist the schemes of Louis XIV. and Napoleon, though *offensive* in form, were really *defensive* in character, and tended to preserve the principle of balance of power. If alliances of this class be excepted, it will be found that the offensive combinations of which history has preserved the records, whatever may have been the real or assumed necessity of their organization, and however wisely they may have been administered, have rarely secured the prevalence of justice, or contributed to the advancement of any righteous cause.

Equal Alliances stipulate for the same or similar contributions of force or resources, or for a proportionate contribution based upon the resources of each ally. *Unequal Alliances* are those in which the contributions stipulated for are unequal in character or amount, or in which the allied powers enjoy different degrees of consideration or influence. Each party to a treaty of alliance is the sole judge as to when the case con-

templated by the treaty exists, or in which the action or intervention of an ally is required.[1]

Treaties of Guarantee. These compacts are accessory in character, and are entered into for the purpose of securing the observance of a treaty already existing, or the permanence of an existing state of affairs. If the guarantee covers the violation of any and every right, the treaty of guarantee creates an alliance. The term guarantee, in its most general sense, includes all treaties the purpose of which is to secure the observance and execution of other treaties, or the maintenance of certain existing conditions for a limited or unlimited period of time. The conditions of the guarantee are stated, in detail, in the body of the treaty. The guarantor state decides when the case exists which was contemplated in its guarantee, and is required to fulfil the conditions stated in the guarantee, and no more. Any change in the guaranteed treaty, without the consent of the guarantor, annuls the obligation. If the duty or aid stipulated is inadequate to the end proposed in the guarantee no additional duty or aid can be required.[2]

The following conditions have been made the subject of guarantee:

(*a.*) The political existence of a state, its sovereignty, or independence, or its existence within certain territorial limits.[3]

(*b.*) The permanent neutrality of a state,[4] or its neutrality under certain conditions.[5] Similarly a portion or fragment of a state may be neutralized with a view to secure the uninterrupted use of a work of public improvement as in the case of the Suez Canal and the proposed interoceanic canals in Nicaragua and on the Isthmus of Panama.

[1] I Halleck, p. 236; Vattel, liv. ii. ch. xii. §§ 174–182; Heffter, § 92.

[2] II Phillimore, pp. 80–88; Vattel, liv. ii. ch. xvi. §§ 235–261; I Halleck, p. 235.

[3] The sovereignty and independence of Greece was guaranteed by France, Great Britain, and Russia, in a treaty negotiated at London, in 1832. The Treaty of Paris, of 1856, contained a somewhat similar provision of respecting the Ottoman empire.

[4] The case of Switzerland is an example of this.

[5] The perpetual neutralization of Belgium was guaranteed by the great powers in the treaty of April 19, 1839.

(*c.*) The free navigation of certain rivers,[1] and the permanent neutrality of works of improvement upon them.

(*d.*) The neutrality of ship-canals and other artificial means of communication between bodies of water of which the navigation is free to ships of all nations.

(*e.*) The payment of loans.[2] In this case the guaranteeing powers usually become guarantors, and are obliged to make good any default of their principals in their stipulated payments of principal or interest.

Reciprocity Treaties. These are compacts containing stipulations requiring the mutual or reciprocal observance of certain duties or obligations. Most treaties, to a certain extent, involve reciprocal action, or the recognition of mutual rights and duties. It is only when a treaty involves a considerable number of such obligations that it receives this name. Extradition and naturalization treaties are reciprocal, but only on the subject from which each is named. Most reciprocity treaties, properly so called, are of a commercial character, and stipulate for specially favorable terms of commercial intercourse, for consular privileges, for the admission of certain products of each state into the ports of the other at special rates of duty, or without the payment of duty.[3] They are usually entered into for a limited period of time, at the end of which they expire, or, at the will of the interested states, are revised and extended for a further period. The component states of a union or confederacy are frequently obliged, by the constitution or treaty of union, to grant many reciprocal priv-

[1] Klüber, § 157.

[2] In the Treaty of London, in 1832, France, Great Britain, and Russia guaranteed a loan of Otho, the Bavarian prince who had been created by them King of Greece.

[3] Treaties containing what is known as "the most favored nation clause" are not generally regarded as operating to entitle states whose treaties contain them to special privileges stipulated for in reciprocity treaties. This for the reason that the subjects covered by the "most favored nation clause" relate to gratuitous privileges merely, and do not apply to reciprocity treaties which contain stipulations which, as they are based upon consideration, partake of the nature of contract obligations. A contrary view, however, has been asserted by Great Britain.—II Dig. Int. Law, § 134; I Ibid. § 68; U. S. For. Rel. 1896, p. 429.

ileges to each other. This was the case in the Zollverein, and is so in the existing German Confederation. According to the Constitution of the United States, the states of the Federal Union are obliged to extradite criminals on the demand of other states, to accord the privileges of citizenship to citizens of other states, and to give full faith to the properly authenticated records and judgments of courts in the other states of the Union.

Rules for the Interpretation of Treaties. Treaties, like laws, are drawn in general terms, and in their preparation the effort is made to frame their provisions in such terms as will include all cases that may fairly arise under them. This is a task of extreme difficulty. As the parties to such agreements, more frequently than not, speak different languages, and represent different, and sometimes opposing, legal and political systems, it is not at all remarkable that causes of difference should arise more frequently in the execution of treaties than in the operation of municipal laws. The *rules* of interpretation in both cases are substantially the same; the *task* of interpretation, however, is vastly more difficult, in the case of treaties, than in the case of contracts and municipal laws. The attempt to frame rules for this purpose has been frequently made; not always, however, with entirely satisfactory results. The English rules of Rutherforth are based upon the common law rules of interpretation as applied to contracts. Those of Vattel and Domat are based upon the rules of the Roman law. To these authors the student is referred for a general discussion of the subject.[1]

The following rules are now generally sanctioned:

(1.) Interpretation must be mutual. Neither party to a

[1] Grotius, liv. ii. chap. xvi.; Vattel, liv. ii. chap. xvii.; Rutherforth, book ii. chap. vii.; I Halleck, pp. 244–250; II Phillimore, §§ 64–67. Phillimore arranges the several rules of interpretation under three heads: (a) *Authentic interpretation;* that is, the exposition supplied by the lawgiver himself. (b) *Usual interpretation;* that which is founded upon usage and precedent. (c) *Doctrinal interpretation;* that which is founded upon a scientific exposition of the terms of the instrument, and which, according to many jurists, is the only interpretation properly so called.—II Phillimore, § 67; Klüber, § 163.

treaty can apply his own rule without impairing, or destroying, the binding force of the instrument.[1]

(2.) A clause of a treaty can have but *one* true meaning.[2]

(3.) The words of a treaty are presumed to have been used in their usual sense and acceptation at the time the treaty was made, unless such interpretation involves an absurdity.[3]

(4.) Terms technical to an art are used in the sense or meaning applied to them in that art; terms peculiar to the language of one of the contracting parties are given the meaning which they have in that language.[4] Where a treaty is executed in more than one language, each language being the language of a contracting party, each document is to be regarded as an original, and the sense of the treaty is to be drawn from them collectively.[5]

(5.) Clauses inserted at the instance, or for the benefit, of one party, are strictly construed; that is, they are given the meaning least favorable to the party at whose instance they were inserted;[6] it is his fault if he has not expressed himself clearly.

(6.) Favorable clauses are to be interpreted liberally. Odious clauses are to be interpreted strictly. Favorable clauses are those granting privileges to individuals or states, or doing away with, or modifying, restrictions upon rights. Harsh clauses are those depriving individuals, or classes of persons, of rights already existing, or abridging such rights or privileges, or rendering them ineffective.[7]

(7.) An interpretation which renders a treaty inoperative is

[1] Hall, § 111; Vattel, liv. ii. chap. xvii. § 265; Klüber, § 163; Heffter, § 85; Wildman, pp. 177, 178; Wharton, Comm. on Amer. Law, § 157; II Dig. Int. Law, § 133.

[2] Boyd's Wheaton, § 287a; II Phillimore, § 73; Vattel, liv. ii. chap. xvii. § 283.

[3] Hall, § 111; Vattel, liv. ii. chap. xvii. §§ 271–282; Wildman, p. 177; Woolsey, § 113; II Phillimore, § 70.

[4] Vattel, liv. ii. chap. xvii. § 276; Wildman, pp. 177–178; Woolsey, § 113; II Dig. Int. Law, § 133; II Phillimore, § 70.

[5] U. S. *vs.* Arredondo, 6 Peters, 691.

[6] Vattel, liv. ii. chap. xvii. § 264; Heffter, § 98; Wildman, p. 179; Woolsey, § 113; II Dig. Int. Law, § 133; II Phillimore, § 70.

[7] Vattel, liv. ii. chap. xvii. §§ 300–310; Wildman, pp. 184, 185; Woolsey, § 113; II Dig. Int. Law, § 133; II Phillimore, § 95.

to be rejected. Treaties are entered into for the purpose of accomplishing an end, or of attaining an object. An interpretation, therefore, which renders a treaty wholly or in part inoperative, is absurd.[1]

(8.) Special clauses are to be preferred to general: prohibitory clauses to permissive; and, in general, that which is expressed in great detail is to be preferred to that which is stated in general terms, or in less particular detail. General clauses are declaratory of a principle. If exceptions exist, they are accurately defined and stated in the modifying clauses which follow the principal clause. The broad terms of a general clause, or title, cannot be appealed to as authority against the precise limitation or exemption of the special clause.[2]

(9.) In the interpretation of a treaty the instrument must be regarded as an organic whole, and every part must be considered with reference to every other part. Hence earlier clauses are explained by later clauses in the same treaty, or by clauses on the same subject in later treaties between the same parties. Obscure clauses in earlier treaties are explained by clearer and more precisely stated clauses in agreements of later date. As regards any particular subject of stipulation, the whole treaty policy of two states on that subject is to be considered. Later treaties explain and modify earlier treaties on the same subject.[3]

Strict, or Restrictive Interpretation, consists in the precise application of the terms of an instrument to a particular case arising under it. It involves the exclusion of all cases not covered by a literal rendering of its terms.[4]

Liberal, or Extensive Interpretation, consists in an attempt to so construe the provisions of a treaty as to include within its operations cases similar in principle to those specifically

[1] Hall, § 111; Vattel, liv. ii. chap. xvii. §§ 282, 283, 286; Wildman, p. 177; Woolsey, § 113.

[2] Wildman, p. 185; Vattel, liv. ii. chap. xvii. §§ 312–317; II Phillimore, § 97.

[3] Vattel, liv. ii. chap. xvii. § 286; II Ferguson, § 133; Wildman, p. 180; Woolsey, § 113; II Phillimore, § 70; II Dig. Int. Law, § 133.

[4] Vattel, liv. ii. chap. xvii. §§ 292, 293; II Phillimore, §§ 82–87.

provided for. It is, in substance, a broad and comprehensive rendering of the clauses of a treaty, regard being had to the *spirit* rather than the *letter* of the instrument.[1]

In connection with the subject of interpretation the following definitions are given of terms frequently used in connection with treaties:

Protocol. This is a word of Byzantine origin, and was at first applied to the first, or outer, sheet of a roll of manuscript, upon which was written or impressed the writer's name, the date of the instrument, and the title of the minister from whose office it issued. As a diplomatic term it is applied to the rough draft of a public act, or to the preliminary draft of an agreement between two or more states, which is to constitute the basis of negotiations in a treaty to be subsequently executed; the term is also applied to the formally authenticated minutes of the proceedings of a congress or conference. In a similar sense it is applied to the preliminary acts and agreements entered into by ambassadors in the preparation of a treaty.

Recez. This term is applied to the act of a diet, or congress, in reducing to writing the result of its deliberations upon a particular subject, before final adjournment.

Separate Articles. These are clauses added to a treaty after it has been formally signed and ratified. They are contained in a separate instrument, and are duly authenticated, but are construed in connection with the treaty to which they refer, and of which they form a part.

The Most Favored Nation Clause. The use of this clause is becoming constantly more frequent in treaties, especially in those of a commercial character. It commends itself by its convenience. Its effect is to extend the scope and operation of a treaty to cover any concessions of privileges, of a similar character to those stipulated for, which may be granted in the future, by either party, to other states, or to their citizens or subjects. The clauses of later treaties granting such concessions in this way become an integral part of the early treaty.

[1] Vattel, liv. ii. chap. xvii. § 290; II Phillimore, pp. 82–87; I Wildman, p. 184; II Twiss, § 230; I Halleck, pp. 244, 245.

The following clause, extracted from a recent treaty of the United States, illustrates the principle involved: "Every right, privilege, or immunity that the Egyptian Government now grants, or may grant in future, to the subjects or citizens, vessels, commerce, and navigation of whatsoever other foreign power, shall be granted to citizens of the United States, vessels, commerce, and navigation, who shall have the right to enjoy the same."[1]

References. The most valuable collection of treaties in the English language is that of Hertslet, vols. i.–iv. This work should be used in connection with "The Map of Europe by Treaty," by the same author. For the treaties of the United States, see "Treaties and Conventions of the United States," etc., 1776–1889, and "The United States Statutes at Large" (annual vols.), 1889–1899. The Spanish work of Calvo, in six volumes, contains all treaties negotiated by the Latin states of America prior to 1862. There are many valuable collections of treaties to which the Continental states of Europe have been parties. None of them are complete, however. Jenkinson's collection contains most English treaties between 1648 and 1785. See also G. F. De Martens, "Esquisse d'une Histoire Diplomatique des Traités," etc.; "Recueil des Principaux Traités," etc., 1761–1818, by G. F. De Martens, with Murrhard's continuation, bringing the work to 1860; and the "Corps Universal Diplomatique" of J. Dumont, which, with its additions, etc., covers, with more or less fulness the period between 315 and 1738 A.D. Rymer's "Fœdera," etc., contains a collection of treaties, between England and other powers, between the years 1101 and 1654. A supplement to this work, in fifty-seven volumes, is preserved in the British Museum. For a full bibliography of this subject, see Klüber, pp. 424–437. In connection with the general subject of treaties see also Vattel, liv. ii. chapters xii.–xvii.; Holtzendorff, §§ 26–28; Heffter, §§ 81–89; Klüber, §§ 141–165; Bluntschli, §§ 402–461; II Phillimore, §§ 44–99; Lawrence, Int. Law, §§ 152–154; Hall, §§ 107–117; I Halleck, chap. viii.; Woolsey, §§ 101–113; Dana's Wheaton, §§ 252–289; I Twiss, §§ 224–264; I Lorimer, pp. 260–269; I Wildman, chap. iv.; II Pradier-Fodéré, §§ 886–1224; II Dig. Int. Law, §§ 130–166.

[1] Treaties and Conventions of the United States, 1776-1887, p. 272. For a clause placing an interpretation upon a favored nation clause, see the Treaty between the United States and Ecuador, Treaties and Conventions of the United States 1776–1887, p. 264. See also the article by M. Ernest Lehr, on the most favored nation clause, in vol. xxv. Revue de Droit Int. pp. 313–323.

CHAPTER IX

THE CONFLICT OF INTERNATIONAL RIGHTS: THE ADJUSTMENT OF DISPUTES, MEDIATION, ARBITRATION, RETORSION, REPRISALS, PACIFIC BLOCKADE

Procedure in Cases of Conflict. When a conflict of international rights arises, as is the case whenever one state has a cause of difference with another, it is customary for the state whose rights have been denied, or trespassed upon, to make known its cause of complaint to the offending state, and to demand that justice be done for the wrong that has been committed. The urgency of this demand is always proportional to the gravity and importance of the injury sustained. The motive of some violations of perfect or sovereign rights may be so obvious and unmistakable that no explanations are asked for by the offended state, and resort is at once had to forcible measures of redress. On the other hand, the offence may consist in the violation of some minor rule of comity of so little importance that a mere exchange of diplomatic notes is deemed a sufficient remedy. Between these two extremes lie the various methods of settling international disputes.[1]

Methods of Adjustment. Those most frequently resorted to are:

(*a.*) An amicable adjustment of the difference by the interested states.

(*b.*) Mediation.

(*c.*) Arbitration.

The Amicable Adjustment of Disputes. A cause of difference between two sovereign states may arise, (a) as a consequence of friction in the relations of the states themselves

[1] III Phillimore, pp. 1, 2; II Ferguson, p. 220; Walker, Manual, p. 93.

as bodies corporate, or (b) as a consequence of injuries alleged to have been sustained by a citizen of the one from the government of the other. In the latter case it is a rule observed by all states that the citizen or subject who prefers the complaint will be required to show, to the satisfaction of the Foreign Office of the state to which such complaint is presented, that he has resorted to, and exhausted, all local means of redress provided by the state by whom the injury is alleged to have been inflicted, before bringing the matter to the attention of his own government.[1]

[1] A citizen of one nation, wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered.—United States *vs.* Diekelman, 92 U. S. 520 [524]. The usage of sovereigns is not to interfere in the administration of justice until the foreign subject who complains has gone with his case to the court of dernier resort. — Pagan's Case, I Opin. Att.-Gen. p. 25, Randolph (1792). A nation ought not to interfere in the causes of its citizens brought before foreign tribunals, except in a case of refusal of justice or of palpable injustice.— Green's case, I Ibid. p. 53, Bradford (1794). The rule that before a citizen of a country is entitled to the aid of his government in obtaining redress for wrongs done him by another government, he must have sought redress in vain through the judicial tribunal of that other government, is inapplicable where the offending government, by the acts of its proper organ, relieves the injured party from the obligation of pursuing such a course. — Panama Transit Tax, XIII Ibid. p. 547, Akerman (1871). Where an officer with a party of armed men, acting under an order of a judicial officer of the port of Granada, seized an American vessel at that port, kept possession of it a few hours, and then withdrew pursuant to an order of the same judge, the seizure having been made for the purpose of enforcing a supposed legal right: Held, that this government ought not to make reclamation in behalf of the owner, as it is presumable that if the proceedings were illegal the judicial tribunals of Nicaragua will afford redress. — Case of the Tipitapa, XIII Ibid. p. 554, Akerman (1872). A Spanish-owned vessel on her way from New York to Havana, being in distress, put, by leave of the admiral commanding the squadron, into Port Royal, S. C., then in rebellion and blockaded by a government fleet, and was seized as prize of war and used by the government. She was afterwards condemned as prize, but ordered to be restored. She never was restored; damages for her seizure, detention, and value being awarded: Held, that clearly she was not prize of war or subject to capture, and that her owners were entitled to fair indemnity, although it might well be doubted whether the case was not more properly a subject for diplomatic adjustment than for determination by the courts. — The *Nuestra Señora de Regla*, 17 Wallace, 30.

Procedure. Whenever a state has occasion to complain of the action of another towards itself or towards one of its subjects, a statement of the particular act complained of is prepared in the Foreign Office of the offended state. This statement is based upon all the ascertainable facts of the case, which should be so carefully sifted and verified, by those charged with their investigation, as to make it impossible to question their substantial accuracy. This is necessary because it is impossible, in international affairs, to produce evidence in the ordinary legal acceptation of the term. The facts thus ascertained and verified are next examined with a view to ascertaining whether they do, or do not, constitute a violation of international law. If they do a statement of the case is prepared and a formal demand for redress is submitted, through the proper diplomatic channels, to the government by whom the injury was committed. In support of this case reference is made to the works of standard text-writers, to the provisions of treaties, if the case be covered by them, and to precedents in international intercourse, especially to those established by the offending state in its international relations. In conclusion, such explanation, disavowal, or reparation is demanded as is warranted by the circumstances of the case.[1]

If that government be clearly in the wrong it acknowledges its error, or disavows the act of its subordinate officials; and offers reparation, accompanied by such explanation and apology as the occasion seems to demand. In cases where such a remedy is suitable, money indemnities are agreed upon and paid to injured parties.[2] It rarely happens, however, that either state, in a particular controversy, is either entirely right, or entirely wrong; and the same facts are, in general, differently regarded by each of two interested states. This leads to controversial discussion, each state advancing arguments and citing authorities in support of that view of the

[1] II De Martens, § 251; Creasy, First Platform, §§ 322–372; III Phillimore, pp. 1–17; Vattel, liv. ii. ch. xviii. §§ 323–326; II Ferguson, § 158; II Dig. Int. Law, §§ 213–222.

[2] See, in this connection, the discussion of the right of a state to protect its citizens abroad, pp. 95–98.

case which it believes to be most nearly in accordance with justice. A correspondence of this kind may continue through a period of years, and rarely leads to results of direct or immediate importance. It is resorted to when two states cherish different views as to the justice of a practice maintained or advocated by one and denied by the other. Such was the long controversy between England and the United States upon the right of search, which extended over a period of more than fifty years. When a nation complains of a clear and decided violation of international law, however, and no dispute exists as to the facts in the case, reparation on the part of the offending state is usually made with the greatest promptness.[1]

Duty of Moderation. In this method of adjustment, much depends upon the tact and moderation shown by the diplomatic representatives of the interested states in dealing with the question of difference. "It not infrequently happens that

[1] The following cases are cited in illustration of this principle:

Case of the Laconia. In December, 1878, the American whaling-ship *Laconia*, while in the port of Zanzibar, Africa, was boarded by an officer of the British ship-of-war *Leader*, Captain Earl. The boarding party took from the *Laconia* three Africans, claiming that they were slaves, Captain Earl justifying his act under the treaty of 1862, between England and the United States, for the suppression of the slave-trade. The matter was represented to the British Government, by whom the action of Captain Earl was promptly disapproved, and the regrets of Her Majesty's Government at the occurrence were conveyed, through the British minister, to the government at Washington. — Foreign Relations of the United States, 1879, pp. 415–432.

Case of the James Bliss. In 1872 the American schooner *James Bliss* was seized, in British territorial waters, by the Canadian police cutter *Stella Maris*, for an alleged violation of the fishery laws. Soon after her arrival in the port of Gaspé Basin the commanding officer of the police cutter caused the Dominion flag to be hoisted above the American, at the mast-head. The act was repeated on the following day, in both instances against the protest of the American consul. The facts were then reported to the Department of State in Washington, by whom they were brought to the attention of the Governor-General of Canada in the diplomatic way. Action was at once taken in the matter. Lord Dufferin, the Governor-General, disavowing, in the amplest manner, any intention of showing disrespect to the American flag. He also announced that he had given most particular instructions directing the discontinuance of the practice.—Foreign Relations of the United States, 1872, pp. 200–208. See also the case of the *Baltimore*, p. 80.

what is at first looked upon as an injury or an insult is found, upon a more deliberate examination, to be a mistake rather than an act of malice, or one designed to give offence. Moreover, the injury may result from the acts of inferior persons, which may not receive the approbation of their own governments. A little moderation and delay, in such cases, may bring to the offended party a just satisfaction, whereas rash and precipitate measures may often lead to the shedding of much innocent blood. The moderation of the Government of the United States in the case of the burning of the American steamboat *Caroline*, in 1837, by a British officer, led to an amicable adjustment of the difficulties arising from a violation of neutral territory, and saved both countries from the disasters of a bloody war."[1] The cases of the *Creole*[2] and of what is known as the Tahiti affair are illustrations of the same principle. In the former case "the feeling in the southern states of the Union was strong in favor of war, and in all human probability would have caused it, had it not been for the friendly and courteous spirit in which the American and British governments carried on their communications on the subject with each other." In the latter case, "the menacing effects of popular indignation at a supposed gross national insult were averted by the fairness and temperance with which one government made its claim for redress, and by the readiness on the other side to enter into a calm investigation of all the circumstances of the case, and to listen to reason and justice rather than to give way to national vanity. Here we have three occasions in which, by the self-action of the parties concerned, by a cool and candid examination of the subject in dispute, and by a gentle method of terminating differences, three of the greatest countries in the world set examples of forbearance that deserve to be recorded as precedents worthy of imitation."[3]

[1] I Halleck, pp. 413, 414.
[2] Page 120.
[3] Sir Edward Creasy, First Platform of International Law, pp. 391, 392; Abdy's Kent, p. 72; I Halleck, pp. 413, 414; II Twiss, § 9.

Amicable Measures of Redress

Mediation. Of all the methods hitherto proposed for preventing international strife this has been by far the most effective and successful in its practical working. It consists, in substance, of a reference of the cause of difference to a disinterested power, who suggests a remedy, or, more frequently, proposes an adjustment based upon such mutual concessions as will remove the cause of difference or irritation. Mediation may be asked by the interested states, or a third power may tender its good offices, with a view to the maintenance of peace. In the latter case the friendly powers tender their good offices, which may be accepted, or not, by the interested states. This method of adjusting international differences was frequently resorted to during the Middle Ages, especially by the Pope, and there are numerous instances of his successful mediatory interference to be found in the history of Europe during that period. In modern times the tendency to mediation has greatly increased in force, and but few cases of conflict of international right have arisen, in recent times, in which the good offices of friendly powers have not been tendered to the litigant states. Although these offers have not always, or even usually, been accepted, their effect has been beneficial, inasmuch as they have furnished new grounds, or reasons, for the settlement of existing difficulties, and have suggested methods of adjustment which had not occurred to the interested parties.[1]

Arbitration. *Private arbitration* consists in the reference of an international difference or dispute to a tribunal composed of one or several persons. To this tribunal the question of difference is submitted, and its decision, when rendered, is binding upon the interested parties. This method of adjustment does not afford so prompt a remedy as can be obtained through mediation, and is applicable to a somewhat

[1] I Halleck, p. 415; Levi, pp. 266, 267; Creasy, pp. 392–394; Woolsey, § 224; Boyd's Wheaton, pp. 95–99, 345; Vattel, liv. ii. chap. xviii. § 328; II Ferguson, § 157, p. 205; Snow, § 34; II Twiss, § 7.

different class of cases. It possesses an advantage over that form of adjustment, however, in that its decisions have greater binding force, since, if rendered in good faith, they cannot be rejected by litigant parties as can offers of mediation.[1]

The composition of the tribunal, the method of selecting its members, the time and place of meeting, its rules of procedure, and the precise question to be referred to it for decision, are always made the subject of a preliminary treaty. This instrument also contains a solemn agreement, on the part of the interested states, to abide by the decision of the board of arbitration. If a person of sovereign rank is selected to act as an arbitrator, the case on each side is submitted to him, through his minister of foreign affairs, and his decision is rendered through the same channel. If the tribunal is composed of several members, the cases are submitted by counsel, whose arguments are heard. The provisions of the Roman law on the subject of arbitration may, with the consent of the interested parties, be made obligatory upon the tribunal. A more liberal code of procedure is frequently provided, or the rules of the Roman law are somewhat modified in their application to a particular case.[2]

In reaching a decision the majority rule prevails, unless otherwise precisely stipulated in the preliminary treaty, and the decision of the tribunal binds the litigant states, unless its validity can be contested upon any one of the following grounds:

[1] For cases in which the United States has been interested in particular cases of arbitration, see the Foreign Relations of the United States, 1874, pp. 195–197; 1875, part i. pp. 185–200, 197–199; 1878, pp. 16–18, 709–711; 1882, pp. 42, 326–332, 398–441; 1886, p. 776; 1888, pp. 79, 134, 455, 456, 468, 1345; 1892, pp. 1–3, 17–19. See also "List and Digest of the Arbitrations to which the United States has been a Party," by Professor John J. Bassett Moore.

[2] I Halleck, pp. 416–418; Hall, p. 361; III Phillimore, pp. 2–14; Creasy, pp. 394–399; Snow, § 34; Heffter, § 109; III F. De Martens, §§ 139–154; III Dig. Int. Law, § 316; Vattel, liv. ii. chap. xviii. § 329; Hosack, pp. 12, 53, 238, 239; I Wildman, pp. 186, 187; Woolsey, pp. 400, 401; III Calvo, §§ 1706–1806; VI Ibid. §§ 352–39. The law faculty of the University of Bologna was frequently called upon to adjust disputes arising among the early Italian republics. The senate of the free city of Hamburg performed a similar office in the north of Europe.—II Twiss, § 5.

(1.) If one of the members of the tribunal has not acted in good faith; or if its decision be tainted with fraud.

(2.) If any of the conditions of the preliminary treaty, as to method of procedure, time, and place of meeting, have not been complied with; or if the decision has not been rendered within the time therein stated.

(3.) If the tribunal has exceeded its jurisdiction; or if its decision goes outside the case submitted to it for adjudication.[1]

Mediation and Arbitration Compared. If the cases be compared in which these methods of adjusting international disputes have been successfully applied, it will be seen that mediation has been found most useful when it has been resorted to to prevent threatened hostilities, especially in cases involving national reputation, or when considerable national feeling has been aroused. It has also been found a successful method of terminating an existing war, especially when a disinterested state has chosen a fitting opportunity, during an interval of hostile operations, to tender its good offices to the belligerent powers. Arbitration, on the contrary, "implies a belief on the part of both that either a legal or quasi-legal question is involved, and that each is, in his own opinion, right; or, in other words, that, when the state of facts is carefully examined, and the law or equitable principle accurately expounded, each hopes and thinks the result will be in his own favor. A *bona fide* belief in the justice of one's own cause is an essential element in a successful arbitration. If such a belief is absent, there can be no readiness to obey the award, and the same causes of acrimony exist after the award as before it."[2] "Arbitration is an expedient of the highest value for terminating international controversies; but it is not applicable to all cases or under all circumstances, and the cases and circumstances to which it is not applicable do not admit of precise definition. Arbitration, therefore, must of necessity be voluntary; and though it may some-

[1] Heffter, § 109; II Twiss, § 5; VI Pradier-Fodéré, § 2628; III Phillimore, § 3; Hall, § 119.

[2] Amos, Science of Law, p. 348; VI Pradier-Fodéré, §§ 2610–2613; II Twiss, § 7.

times be a moral duty to resort to it, cannot be commanded, in any form, by what is called the positive law of nations."[1]

Arbitration Convention of The International Peace Conference at The Hague.

Purpose of the Conference. With a view to secure concerted action in respect to certain questions of serious international concern, having to do with the maintenance of the general peace and the amelioration of the hardships of war on land and sea; and with the view of securing, if possible, an agreement looking to a gradual, but sensible, reduction in the burdens of military and naval armaments, a conference of delegates met at The Hague on May 18, 1899, in response to an invitation addressed by the Emperor of Russia to the principal states of the civilized world. In pursuance of the invitation thus issued, one hundred and one delegates, representing twenty-six states, appeared and exchanged their credentials at The Hague on the day appointed for the meeting of the conference. The conference completed its labors at a final session held on July 29, 1899. Apart from its deliberations in respect to the subject of international arbitration, other questions were discussed, and important conclusions were reached which will be discussed elsewhere. The most important results of its labors, however, are to be found in the convention for the adjustment of international disputes, to which sixteen important states of the world were signatory parties.[2] The following are its more important provisions:

[1] Sir Montague Bernard, Letter to *London Times*, October 18, 1873. An arbitration treaty between England and the United States, negotiated in 1896, failed to receive the approval of the United States Senate. — Foreign Relations of the United States, 1896, p. 238.

[2] Although the most important, the scheme proposed by the International Peace Conference is by no means the first project for the general adjustment of international disputes by a resort to arbitration. The Institut de Droit International at its session of 1875 prepared a scheme for the adjustment of international disputes by arbitration, which was published, with a view to its general adoption, in the *Annuaire* of the Institute for that year. For the text of this project, see the

Good Offices and Mediation. The convention contains an undertaking, on the part of the signatory powers, to resort to good offices, or mediation, in cases of serious differences, or disputes, arising between two or more of the states which are parties to its operation. It creates a right of initiative in this regard, in behalf of disinterested states, by conferring upon them the duty of tendering their good offices to the contending parties at any time, either before or after the outbreak of hostilities. It also provides, in express terms, that such mediatory endeavors shall never be considered, by the litigant powers, as an unfriendly act. A method of procedure is embodied in the convention by which, in the event of a dispute, seriously compromising international peace, the duty of mediation is intrusted to powers chosen by the parties in litigation, who are required, pending such mediatory endeavors, to refrain from all direct communication with each other in respect to the subject of the controversy, leaving the matter of amicable adjustment to the exclusive jurisdiction of the powers who have been invited to use their good offices in reaching a basis of settlement which shall be satisfactory to the litigant states. With a view to secure prompt adjustment of the difference, the time consumed by the mediating powers is not to exceed thirty days under any single delegation of mediatory authority. In the event of a complete rupture of friendly relations, the mediatory states continue to be charged with the duty of tendering their good offices whenever the opportunity for such action presents itself, under circumstances leading to the belief that the mediatory interposition of a disinterested power will prove acceptable to the belligerent states.

The International Commission of Inquiry. With a view to facilitate the adjustment of international differences, "af-

Annuaire de l'Institut de Droit International for 1875, p. 126; Ibid. 1878, p. 160; see also, in this connection, the article by Professor Lorimer in vol. ix. of the Revue de Droit International, pp. 161–206; Professor Sheldon Amos, Political and Legal Remedies for War, vol. iii.; Calvo, § 1803; and vol. ii. Ferguson, § 160.

fecting neither the honor nor essential interests" of the states concerned, by clearing up such controverted questions of fact as are susceptible of judicial ascertainment or verification, the convention provides for the creation of an International Commission of Inquiry. The commission is called into being by a preliminary agreement between the parties, which provides for the constitution, composition, and procedure of the tribunal, states the question of fact the investigation of which is desired, and prescribes the form in which evidence is to be presented in behalf of both parties to the controversy. At the conclusion of the investigation a report containing the conclusions of fact reached by the tribunal, as a result of its inquiry, is submitted to the states concerned. This report is rendered, however, subject to the qualification that the conclusions of fact which it contains are not to have the character or force of an arbitral judgment, the effect which is to be given to them being left to the discretion of the parties to the investigation.

Permanent Court of Arbitration. With a view to secure a resort to international arbitration for the settlement of disputes between states "by judges of their own choice and upon a basis of respect for law," the convention provides for the creation of a Permanent Court of Arbitration. The court is to be composed of persons chosen by the litigant parties from a permanent list of arbitrators, nominated by the signatory powers, from among their respective citizens or subjects who are fitted by character, capacity, and training for the performance of the duties which may be assigned them in connection with the arbitration of international disputes. The persons so named hold office for the term of six years, and their appointments may be renewed for successive terms.

How Constituted. In the event of a cause of difference arising among two or more states which are parties to the convention (the attempt to constitute a tribunal by agreement between the contending parties having failed), a court of arbitration is constituted in the following manner: Each party to the controversy names two arbitrators who are, or may be, selected from the permanent list, the preparation of which has

just been described, and which is preserved for that purpose in the central bureau at The Hague. The persons thus selected by the contending parties choose an umpire. In the event of a failure to make selection, due to an equality of votes, the choice of an umpire is referred to two disinterested powers selected for that purpose by the parties to the proposed arbitration.

The preliminary agreement sets forth the precise question which is to be referred to the tribunal for determination, and defines the character and extent of the powers conferred upon the arbitral tribunal; the execution of this agreement implies an undertaking on the part of the signatory powers to be bound by the judgment of the court thus constituted.

Procedure. If the subject of procedure is not regulated in the preliminary agreement, the convention itself prescribes suitable rules of procedure, including the form in which the cases of the parties to the controversy are to be presented, the order and method of their presentation, and the rules governing the introduction of evidence. These rules are calculated to secure a complete and orderly presentation of the cases of the interested parties, a fair trial of the issue involved, and a final decision on the strict merits of the case, as determined by the evidence submitted in support of the claims of the parties at issue. The court is authorized to decide questions arising, from time to time, during the progress of the trial, and is expressly authorized, by the terms of the convention, to interpret the arbitral agreement and, similarly, to place an authoritative interpretation upon clauses of treaties which are cited or appealed to by counsel, and to apply the rules of international law. The decisions of the tribunal on such points are final and cannot be made the subject of subsequent discussion.

Decision. When the case on both sides has been fully presented, and the court has obtained from the parties such information germane to the inquiry, as it may deem necessary to a full understanding of the controversy, the president declares the case closed, and the court, in closed session, delib-

erates upon its findings of fact, reaches a decision upon the merits of the case, and prepares its judgment. The arbitral judgment, which is reached by a majority of votes, and is signed by all the members of the tribunal, fully sets forth the reasons actuating the decision; but members of the minority may assign the reasons for their dissent in attaching their signatures to the arbitral decision.

Review of the Judgment. A review of the judgment may be provided for in the preliminary agreement, and, if thus provided for, may be demanded by either party, within certain fixed limits of time after the decision of the tribunal shall have been rendered. Such review can be had, however, only where new facts have been brought to light after the case before the tribunal has been formally closed; and the original judgment may be revised only in consequence of the presentation of such new matter of fact, at the rehearing granted by the tribunal for that express purpose. With a view to confer obligatory force upon the judgments of arbitral tribunals, the convention contains the stipulation that the decision of the permanent court shall be accepted by the litigant parties as a final determination of the cause of difference referred by them to the arbitral tribunal for decision.[1]

Reservation of the United States. The Arbitral Convention was signed by the delegates representing the United States with the following reservation: "The delegation of the United States of America, in signing the convention regulating the

[1] Of the twenty-six states represented at the International Peace Conference, sixteen participated in the Arbitral Convention: France, Spain, Portugal, Russia, Belgium, Holland, Denmark, Sweden and Norway, Greece, Bulgaria, Roumania, Montenegro, Persia, Siam, the United States, and Mexico. Ten of the powers represented at the conference did not become signatory parties to the convention: Great Britain, Germany, Austria-Hungary, Italy, Turkey, Servia, Switzerland, Luxembourg, China, and Japan. The signature of the United States was accompanied by a reservation which is fully set forth in the text; but there is no statement, or declaration, from any of the non-signatory powers above mentioned showing why the terms of the agreement were not accepted, or acceded to, by them. For the text of the Convention, see Appendix E.

peaceable settlement of international conflicts, as proposed by the International Peace Conference, make the following declarations: Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment, by the United States of America, of its traditional attitude towards purely American questions."

MEASURES OF REDRESS, INVOLVING THE USE OF FORCE, BUT FALLING SHORT OF WAR

When Resorted to. Between the peaceable methods of adjusting international disputes, which have already been described, and an actual resort to force, lie certain measures of redress of a more serious character. These methods presume the existence of a cause of difference between two states, justifying a departure from the normal relations existing between the nations in time of peace, and the measures adopted at times involve the use of violence or force; but, even when exercised to an extreme degree, they fall far short of open or public war. They are resorted to only when redress has been asked for and denied, and are justifiable only when the offending nation acts with full knowledge, and persists in doing injustice even after its attention has been repeatedly drawn to its wrongful acts.[1]

The measures of redress involving the use of forcible or hostile methods are susceptible of classification under one of two heads—retorsion and reprisals.

Retorsion consists of an application of the same rule of conduct in our relations with another state as is applied, by that state, in its relations with us. It is an application of the law of retaliation in international affairs. If a state imposes un-

[1] Lawrence, Int. Law, § 156; Woolsey, § 118; III Phillimore, §§ 7–12; Dana's Wheaton, § 290; Snow, p. 78; II Twiss, § 10; Heffter, § 110; III F. De Martens, § 105; III Calvo, § 1807; IV Ibid. §§ 2041, 2042.

just restrictions upon aliens residing within its territories, the state whose subjects they are is justified in imposing the same, or equivalent, restrictions upon the subjects of the offending state who are resident within its borders. If it refuse privileges usually granted by states to ambassadors and consuls, the offended states are justified in a similar refusal of privileges to its consuls and diplomatic representatives.

The field within which the principle of retorsion may be applied, already very extensive, is constantly increasing. This state of affairs is due to the fact that the commercial relations of states are increasing in intricacy in direct proportion as they increase in extent and amount, giving rise to frequent conflicts between the commercial, or internal, policy of particular states, and their external, or international, policy. Illustrations of this tendency are to be found in the experience of states which derive a large portion of their revenue from customs duties. If some article of native production falls in price on account of foreign competition, an attempt is made to remedy the difficulty by increasing the duty upon the corresponding foreign article. This is felt at once in the state in which the particular article is produced, or manufactured, and retaliatory measures are resorted to with a view of compelling the removal of the trade restriction.

Acts of retorsion must be confined to the class of imperfect rights, except when resorted to by way of retaliation for similar or identical acts on the part of a foreign state. The denial of a *perfect* right amounts to a just cause for war.[1]

Reprisals. *Reprisals* consist in the forcible seizure or detention of property belonging to an offending state, or to its citizens, which may be found within the territory of the offended state, or on the high seas. The things seized are held subject to the termination of the controversy. If it be settled

[1] I Halleck, pp. 422, 423; Hall, § 120; II De Martens, Précis, chap. ii. § 254; Bluntschli, § 505; III Phillimore, § 7; Manning, p. 142; Creasy, p. 400; II Ferguson, pp. 223, 224; Woolsey, p. 188; Boyd's Wheaton, § 290; Lawrence, Int. Law, § 157; III Calvo, § 1807; III F. De Martens, § 105; Vattel, liv. ii. § 341.

amicably, the property is restored, and reparation is sometimes made for the delay and damage that has resulted from the seizure. If the dispute results in war, the property seized is condemned as prize.

Reprisals differ from retorsion not only in kind but in degree. Retorsion is resorted to when imperfect rights have been trespassed upon, or when there has been a failure to observe the rules of comity. *Reprisals* are resorted to when *perfect* rights have been drawn in question, or denied, or when there has been an absolute refusal of justice. They are *acts of violence*, and may be regarded by the state towards which they are directed as amounting to a declaration of war. They are justifiable only when there has been an absolute denial of justice, so deliberate and intentional on the part of the offending state as to constitute a sufficient cause for war. If war does not result, it is because the offended state, appreciating the hardship and suffering that are involved in a resort to actual hostilities, chooses to regard the offence as technical, by undertaking to redress its wrong by similar, though less violent, measures. In recent times they have been less frequently resorted to than formerly, especially by the more powerful states of Europe and America in their occasional controversies with each other. The present tendency is to resort to them only when the injured state is considerably more powerful than its adversary, and generally with the effect of obtaining the desired redress without recourse to war. "Much of what appears in the older and even in some modern books upon the subject of reprisals has become antiquated. Special reprisals, or reprisals in which letters of marque are issued to the persons who have suffered at the hands of a foreign state, are no longer made; all the reprisals that are now made may be said to be general reprisals, carried out through the ordinary authorized agents of the state, letters of marque being no longer issued."[1]

[1] Hall, p. 368 (note), 369–372; I Halleck, pp. 423–433; Manning, pp. 145–160; Creasy, pp. 401–405; Field, Int. Code, pp. 471–473; II Ferguson, pp. 223–236; III Phillimore, pp. 18–43; I Ortolan, p. 346;

Embargo. An embargo is a form of reprisals, and consists in the detention in port of the ships of all nations, or those of a particular nation, pending the adjustment of an existing controversy. If war results, the detention is called a hostile embargo, and the ships of the offending state, and their cargoes, become prize; if, on the other hand, there is no interruption of peaceful relations, the embargo is raised, when the object for which it was established has been attained, and the vessels detained in port are permitted to sail.[1] The United States has resorted to the embargo, as a means of redress, upon four occasions in its history. The first, imposed in consequence of the strained relations with England, was established in 1794,[2] and authorized the President whenever, in his opinion, the public safety should so require, "to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same whenever he shall think proper." No embargo was to be laid, however, while Congress was in session, and, if laid, it was not to continue in force more than fifteen days after the meeting of Congress.

A second embargo was laid on "all ships and vessels in the ports and places within the limits and jurisdiction of the United States" by the act of December 22, 1797;[3] by subsequent enactments the restriction was extended to include vessels engaged in the coasting trade.[4] A third embargo was imposed by the act of December 22, 1807, due, in part, to the continued attempts on the part of Great Britain to exercise

I Wildman, pp. 187–198; Walker, Manual, p. 94; Woolsey, pp. 188–191; Bluntschli, § 500; Boyd's Wheaton, §§ 291, 292, 293a, 293b; Lawrence, International Law, § 157; Snow, § 35; III Dig. Int. Law, § 318; Vattel, liv. ii. chap. xviii. §§ 342–354.

[1] II Ferguson, §§ 166, 251; III Phillimore, pp. 44–50; Lawrence, Int. Law, § 158; Heffter, § 111; I Halleck, pp. 433–436; III Dig. Int. Law, § 320.

[2] Act of June 4, 1794 (1 Stat. at Large, p. 372).

[3] 2 Stat. at Large, p. 451.

[4] Acts of December 22, 1807 (2 Stat. at Large, p. 453); March 12, 1808 (2 Ibid. p. 473); April 25, 1809 (2 Ibid. p. 499); June 9, 1809 (2 Ibid. p. 506).

the right of impressing seamen from American vessels on the high seas;[1] the fourth, and last instance of the exercise of this right, on the part of the United States, occurred at the outbreak of the War of 1812 with Great Britain. The conditions of the embargo on this occasion are fully set forth in the act of April 4, 1812.[2] This enactment laid an embargo upon all ships and vessels in the ports and places within the limits and jurisdiction of the United States which were bound to any foreign port or place. Vessels in ballast were excepted from the operation of the statute, which was to remain in force for a period of ninety days from the date of its passage.[3]

Pacific Blockade. The practice of interrupting commercial intercourse with certain ports or coasts of a state, with a view of securing redress for an international wrong, which has become known as the right of pacific blockade, is of very recent origin; there being no instance of its exercise prior to the year 1827. In that year, Greece and Turkey being at war, those portions of the Greek coasts in the vicinity of which bodies of Turkish troops were encamped, were blockaded by the fleets of Great Britain and Russia; the action of the blockading powers, however, was regarded as a measure of hostility by the Sultan and resulted in the Turkish defeat at Navarino. Pacific blockades have been subsequently established, under similar circumstances, and in such numbers that the practice bids fair to increase, rather than diminish, as a means of redress of international grievances. From an examination of the cases in which such blockades have been established the following conclusions would seem to be warranted:[4]

[1] Acts of December 22, 1807 (2 Stat. at Large, p. 451); January 9, 1808 (Ibid. p. 453); March 12, 1808 (Ibid. p. 473); April 25, 1808 (Ibid. p. 499); and January 9, 1809 (Ibid. p. 506).

[2] Act of April 4, 1812 (2 Stat. at Large, p. 700).

[3] For a discussion of the subject of embargoes, see Hall, p. 366; Manning, pp. 143, 144; II Ferguson, pp. 236–240; III Phillimore, pp. 44–49; I Ortolan, p. 350; Walker, Manual, pp. 95, 96; Woolsey, § 118; Boyd's Wheaton, § 293; the *Boedes Lust*, V Robinson's Adm. Rep. 234, 246.

[4] Similar blockades were established by France, in 1832, at the mouth of the river Tagus; by Eng-

(*a.*) They have been resorted to, to secure redress for an offence at international law, in cases in which reparation has been demanded, but refused or unnecessarily delayed, and which, in former times, would have given occasion for hostilities amounting to public war.

(*b.*) There has been a decided difference in the military and naval strength of the states interested, the blockading power being, as a rule, very much stronger in a military sense than the alleged offender; and the blockades have, in general, been resorted to with a view to secure adequate redress without a resort to war.

(*c.*) The exercise of the right of pacific blockade can affect only the commercial intercourse of the states immediately concerned. This for the reason that the ordinary peaceful relations of other powers with the blockaded ports or coasts, including their commercial intercourse, cannot be interrupted or abridged, without their consent.

(*d.*) In recent instances of the exercise of the right the tendency has been to regard the practice as a measure of international police, in which several powers have concurred as to the justice of the proceeding and the necessity for its exercise; and the blockade has been raised, or discontinued, and normal commercial relations have been resumed, so soon as reparation has been made by the offending state.

(*e.*) Although called "blockades" the interruptions to com-

land and France, in 1833, at the Dutch ports on the North Sea; by France, in 1838, at the port of Vera Cruz; by France and Great Britain, in the same year at certain ports of the Argentine Republic, a state of affairs which continued for ten years; by Great Britain, in 1850, in the ports of Greece; in 1860 the Neapolitan ports of Sicily were blockaded by a Sardinian fleet, in connection with that of the revolutionists in Naples; in 1862 the port of Rio Janeiro was blockaded by Great Britain; in February, 1879, the coast of Bolivia was blockaded by Chili; in 1880 the Turkish port of Dulcigno was blockaded by vessels of war representing Great Britain, Austria, France, Russia, and Italy. — III Dig. Int. Law, § 364; Lawrence, Int. Law, § 159; Walker, Int. Law, p. 157; Snow, pp. 79, 80; Geffcken, Revue de Droit Int. vol. xix. pp. 377–383; Perels, Ibid. pp. 245, 252, 360; Woolsey, Ibid. 1875, p. 611; Hall, pp. 369–372; II Ferguson, pp. 240, 241; Walker, Manual, pp. 97–107; Woolsey, § 119; vol. xxix. Revue de Droit Int. pp. 474–491; Heffter, § 111; Risley, p. 62; III Calvo, §§ 1832–1859.

merce which have passed by that name have, in fact, been measures of reprisal in the nature of embargoes. If the practice becomes general the rules regulating the exercise of the right will be assimilated to those controlling reprisals in the nature of embargoes, rather than to those respecting the establishment of blockades, properly so called, in time of public war.[1]

References. Three methods of adjusting international disputes have been discussed in this chapter—1. Amicable Adjustment; 2. Mediation; 3. Arbitration. Under the head of amicable adjustment, the following references are suggested: Halleck, vol. i. chap. xiv. §§ 1–3; Heffter, liv. ii. chap. i. §§ 106–108; Vattel, book ii. chap. xviii. §§ 324–326; Creasy, pp. 390, 391; Phillimore, vol. iii. chap. i. pp. 2–5. For mediation, see Boyd's Wheaton, pp. 97–99, and pp. 345, 706; Halleck, vol. i. chap. xiv. §§ 5–6; Heffter, liv. ii. chap. i. § 107; Creasy, pp. 390–392; Klüber, chap. iii. §§ 318–321; Vattel, book ii. chap. xviii. § 328; I Dig. Int. Law, § 49; III Calvo, §§ 1682–1756. Under the head of arbitration, see Hall, p. 361; Manning, pp. 499–504; Halleck, vol. i. chap. xiv. §§ 6–8; Boyd's Wheaton, § 288; Vattel, book ii. chap. xviii. §§ 329–334; Wildman, vol. i. p. 186; Heffter, § 109; Klüber, § 318; Creasy, pp. 83, 394–397, 698; Phillimore, vol. iii. pp. 2–15; G. F. De Martens, vol. ii. § 176; Calvo, vol. iii. §§ 1706–1806; vi. Ibid. §§ 338, 352–390; III F. De Martens, §§ 138–154. For the schemes which have been suggested for the peaceable settlement of international differences, see Manning, chap. xiv.; Amos, "Science of Law," pp. 345–359; Amos, "Political and Legal Remedies for War"; Bernard, "Neutrality of England," pp. 494–506; Wheaton, "History of the Law of Nations," pp. 750–758; Laveleye, "La Guerre en Europe et Arbitrage"; Abbot, "Essays on Modern International Law," essay v.; "The Primacy of the Great Powers"; essay vi. "The Evolution of Peace"; Snow, International Law, § 38; vol. ix. "Revue de Droit International," pp. 161–206; xix. Ibid. pp. 398, 472, 479; xxix. Ibid. pp. 333–

[1] The following resolutions respecting pacific blockades were adopted by the Institute of International Law at its session at Heidelberg in 1887:

(1.) Foreign vessels may enter freely, despite the blockade.

(2.) Pacific blockades are to be officially declared and notified, and must be maintained by a sufficient force.

(3.) Vessels of the blockading power which do not respect the blockade may be sequestered. The blockade having ceased, they are to be restored to their owners, without compensation of any sort. —Rev. de Droit Int. vol. xix. p. 361.

375; xxx. Ibid. pp. 445-462; "History and Digest of the International Arbitrations to which the United States have been a Party," by John Bassett Moore, vols. i.–vii. For the Arbitration Convention adopted by the International Peace Conference at The Hague, on July 29, 1899, see Appendix E; see also the articles by M. Desjardins in the "Revue des Deux Mondes" for September 1, 1899 (vol. clv. p. 5); by Captain Alfred T. Mahan, of the United States Navy, in the "North American Review" for October, 1899 (vol. clxix. p. 433); by W. T. Stead in "The Forum" for September, 1899, p. 1; and the articles entitled "The Conference and Arbitration" in the "Edinburgh Review" for July, 1899 (vol. cxc. note 389, p. 190); and "A Note on the Peace Conference" in the "Quarterly Review" for October, 1899, (vol. cxc. no. 350).

CHAPTER X

WAR: DECLARATION, EFFECTS, THE RULES OF WAR, MARITIME WAR

"The choler and manhood that you have, score it, in God's name, upon the fronts of your enemies, but stain not the honor of a soldier by outraging unarmed innocence. Live upon your means like soldiers, and not by pilfering and spoiling like highway robbers. This, if you do not, you shall ever be infamous, and I with such help shall never be victorious." [1]—GUSTAVUS ADOLPHUS.

The Right of Redress. As there is no superior authority to which a state can appeal for redress when any of its sovereign rights have been trespassed upon, denied, or impeded in their exercise, it is compelled, as a last resort, to redress its own injury or wrong. This it does by a suspension of all friendly relations with the offending state, and by a resort to such acts of hostility as are authorized by the laws of war. Again, in the performance of its duty of protecting its citizens and their property from acts of domestic violence, a government sometimes finds its ordinary legal machinery inadequate to the purpose, and is compelled to make use of the public armed force in order to compel obedience to the law, to quell insurrection and rebellion, or to enforce respect for its neutral obligations. In one case the state uses force against another state; in the other its force is directed against a portion of its own population and the military operations are carried on within its own territory.

War may therefore be defined as an armed contest between states or parts of states.[2] It is undertaken by one state

[1] Lawrence, Essays on Modern International Law, p. 178.

[2] War is defined by Grotius as "the state or situation of those who dispute by force of arms" (De Jure Belli ac Pacis, book i. chap. i. par. 2). It is defined by Vattel as "that state in which we prose-

against another, for the purpose of compelling an offending state to fulfil its obligations as a party to international law. It is undertaken against persons within its territory for the purpose of compelling obedience to its municipal laws. When its object is attained, in either case, war becomes unlawful and must cease.

Rightfulness of War. With the inherent rightfulness of war international law has nothing to do. War exists as a fact of international relations, and, as such, it is accepted and discussed. In defining the law of war, at any time, the attempt is made to formulate its rules and practices, and to secure the general consent of nations to such modifications of its usages as will tend towards greater humanity, or will shorten its duration, restrict its operations, and hasten the return of peace and the restoration of the belligerent states to their normal relations.[1]

Causes of War. Although it falls within the province of international law to determine how war between civilized states shall be carried on, and with what formalities it shall begin and end, it is impossible to deduce from the history of international relations any precise rule for determining what fact, or facts, shall constitute a just cause for war. It has been said that a perfect right of a sovereign state can be invaded, or denied, only at the risk of war, and, in so far as international law is concerned, a state is legally justified in regarding the denial of such a right as a sufficient cause for war. The question of

cute our right by force" (Vattel, Law of Nations, book iii. chap. i. § 1). It is defined by Bynkershoek as "a contest carried on between independent persons for the sake of asserting their rights" (Bynkershoek, Law of War, p. 128); by Wheaton as "a contest by force between independent sovereign states" (Wheaton, part iv. chap. i. § 6). "Every contention by force between two nations in external matters, under the authority of their respective governments, is not only war, but public war."—Bas *vs.* Tingy, 4 Dallas, 37; Creasy, pp. 360, 361; Field, Int. Code, 467-469; II Ferguson, §§ 169–172; III Phillimore, p. 77; Woolsey, §§ 114, 115; Boyd's Wheaton, § 290; Risley, p. 67; II Twiss, pp. 43–49; Lawrence, § 155; IV Calvo, §§ 1860–1865.

[1] I Halleck, pp. 439, 440; Boyd's Wheaton, § 290; Snow, pp. 82, 83; Risley, pp. 68, 69; II Twiss, pp. 54, 55; Creasy, pp. 361–367; Vattel, liv. iii. chap. i. §§ 3, 4; III Phillimore, pp. 54–84; Woolsey, § 116.

determining whether a particular cause of offence is, or is not, sufficient to justify war, is strictly internal in character, and concerns the offended state alone. With the government of that state rests the entire legal and moral responsibility of decision. The efficient check upon a nation in this respect must be found in international public opinion rather than in international law.[1]

Responsibility for a Resort to War. While it is technically true that a violation or denial of a perfect right is regarded as a just cause for war, it is true only because no other remedy is provided for the violation, by a state, of a rule of international law. As there is no authority above a sovereign state to which it can appeal, it is of necessity compelled to redress, by its own means, any injuries that it may receive from another state. But it by no means follows that every denial of a perfect right results in war, even when justice has been demanded and refused. Those in whose hands the government is must consider whether the injury that has been received is sufficient, in amount or importance, to counterbalance the evils that are involved in a resort to war. The chance of success must be considered, as well as the ability of the state to bear the burden of long-continued hostilities.

Moral Considerations Involved. Certain moral considerations are also involved in the decision, the responsibility for which no government can evade. "If reparation can otherwise be obtained, a nation has no necessary, and therefore no just, cause for war: if there be no probability of obtaining it by arms, a government cannot, with justice to their own nation, embark it in war; and if the evils of resistance should appear, on the whole, greater than those of submission, wise rulers will consider an abstinence from a pernicious exercise of right as a sacred duty to their own subjects, and a debt which every people owes to the great commonwealth of mankind,

[1] Vattel, liv. iii. chap. iii. §§ 24–50; I Halleck, pp. 439–442; II Ferguson, § 172; III Phillimore, pp. 57–76; Woolsey, §§ 115, 116; IV Calvo, §§ 1863–1898; Bluntschli, §§ 515–521; II Twiss, § 29; II Lorimer, chap. x.; Klüber, § 237; Manning, pp. 131–140.

of which they and their enemies are alike members. A war is just against a wrong-doer when reparation for wrong cannot otherwise be obtained; but it is then only conformable to all the principles of morality when it is not likely to expose the nation by whom it is levied to greater evils than it professes to avert, and when it does not inflict on the nation which has done the wrong sufferings altogether disproportionate to the extent of the injury. When the rulers of a nation are required to determine a question of peace or war, the bare justice of their case against the wrong-doer never can be the sole, and is not always the chief, matter on which they are morally bound to exercise a conscientious deliberation. Prudence in conducting the affairs of their subjects is in them a part of justice."[1]

Classification of Wars. Wars are classified according to the point of view from which they are examined or discussed. They are classified according to their causes into *wars of opinion, religious wars, wars of independence, of conquest, or subjugation.* In a military sense they are *offensive* or *defensive.* In a political sense they are classified into *external* and *internal* wars. *Internal* wars are further subdivided into: 1st. *Civil wars,* in which the belligerent parties are distributed over a large part of the territory of a state, the object being to secure a change of government or laws, but not at the expense of national unity; 2d. *Rebellions* or *insurrections,* in which a portion of the population of a state rises against the central government, sometimes with the design of securing a separation from it, sometimes with a view to resist the execution of harsh or oppressive laws, or measures of administration.[2]

[1] Mackintosh's Collected Works, p. 430, cited by Creasy, "First Platform of International Law," pp. 362, 363.

[2] Insurrection against a government may, or may not, culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on.—The "Prize Cases," 2 Black, 635. The offence of levying war upon a state, when committed by a subject, is called treason; and

The Belligerent Parties. The states which are parties to a particular war are called *belligerents*. Their operations must be carried on in accordance with certain accepted usages, which are sanctioned by all nations under the name of the *Laws of War*. Whenever a state occupies the position of a belligerent, it is vested with all the rights, and charged with all the obligations, incident to a state of war. The parties to an internal war are also called belligerents. They acquire belligerent rights so soon as the central government decides to resort to warlike methods in order to quell the insurrection. The recognition of such rights by the central government, or by foreign powers, in no way involves the recognition of the rebellious government as a separate political organization. It only implies that the laws of war are to prevail in the military operations undertaken for the purpose of suppressing the re-

an act of treason is an act of war. When participated in by a few persons, it is dealt with by the civil authorities, and the offenders are tried and punished by the courts of the state having jurisdiction of the offence; when participated in by such numbers of persons as to make it impossible for the duly constituted civil authorities to deal with it, the military power of the state is employed in its suppression, and, in the interest of humanity, what are called "belligerent rights" are usually accorded to the insurgents, and the operations undertaken with a view to quell the insurrection are carried on in conformity to the rules of civilized warfare. The granting of belligerent rights, however, does not impair the right of the central government to try those who have participated in the insurrection for treason, or for such other offences as may have been committed by them during the period of active hostilities. See also I Halleck, pp. 454-473; Vattel, liv. iii. ch. i. §§ 1-5; Hall, § 5. The United States, in the enforcement of their constitutional rights against armed insurrection, have all the powers, not only of a sovereign, but also of the most favored belligerent.—Lamar *vs.* Browne, 92 U. S. 187. A revolutionary party, like a foreign belligerent power, is supreme over the country it conquers, as far and as long as its arms can carry and maintain it; and when the former government resumes its possession of the territory it cannot call the citizens or subjects of a third nation to account for obeying the authority which was temporarily supreme.—IX Opin. Att.-Gen. p. 140. Although it has been doubted whether a mere body of rebellious men can claim all the rights of a separate power on the high seas, without absolute or qualified recognition from foreign governments, there is no authority for a doubt that the parties to a civil war have the right to conduct it with all the incidents of lawful war within the territory to which they both belong.—Ibid.

bellion, enforcing the laws, and restoring the supremacy of the national government.

Neutrals: the Status of Neutrality. All states in the civilized world, which do not become parties to an existing war—as belligerents or allies—are placed by the declaration of war, or the outbreak of hostilities, in a peculiar status of non-interference, hereafter to be explained, called *neutrality*. These non-participating states are called *neutrals*, and their subjects are known as *neutral subjects;* the peculiar immunities which become operative in their behalf, in respect to hostile operations, are called *neutral rights*, and the obligations in respect to non-interference, with which such states become charged at the outbreak of war, are known as *neutral duties*.[1]

It will thus be seen that the status of belligerency is occupied by the states which are the immediate parties to an existing war; the status of neutrality, on the other hand, is occupied by those states which refrain from participating in the war, either as belligerents or allies. The status of neutrality is thus seen to be involuntary, in that it results from the mere fact that war exists between two or more states, with all of which the neutral is at peace. It becomes operative at the declaration of war, or at the outbreak of hostilities; and is made known, or publicly assumed, by a formal proclamation, issued by the neutral state, in which the fact of war is recognized and its subjects are warned to refrain from participating in its operations.

Recognition of Belligerency in Internal Wars. It has been seen that belligerent rights are acquired by the states that are parties to a particular conflict at the declaration of war, or, in the event of there being no formal declaration, at the outbreak of hostilities; at the same moment the rights and obligations of neutral states become operative. In respect to internal wars, however, the case is not quite the same. The central government is engaged in the suppression of a domestic insurrection, and, in virtue of its independence, it is entitled

[1] For a more complete discussion of the neutral relation, see the chapter entitled "Neutrality." See also II Ortolan, pp. 77–83.

to an immunity from interference in so doing. It is only when the insurrectionary movement has attained such form and proportions that the central government has been compelled to resort to military force in its suppression—until, indeed, there is something to recognize—that the matter assumes international importance.

The question of according or withholding rights of belligerency in respect to the insurgent subjects of a foreign power is one which every sovereign state determines for itself, in view of the particular facts in each case. As to what conditions must be fulfilled to warrant such recognition of belligerency, it may be said that the conflict must be one amounting to public war; the mere existence of contending armed bodies, who come into occasional conflicts, not constituting a state of public war in the sense in which that term is here used. The insurrectionary movement must have been participated in by a considerable portion of the population of the state; the relative strength of the parties must be such as to give some assurance of success of the cause of the insurgents; they must have proved their ability to maintain themselves in certain well-defined limits of territory, and must have established, and must be prepared to maintain, such governmental institutions as will enable them to enter into diplomatic intercourse with the states whose recognition is sought.[1] If the belligerency of the insurgents be recognized before the conditions above described have been fulfilled, it may properly be regarded as a cause of offence by the state within whose territories the insurrection is in progress.[2] If, on the other hand, it be delayed too long, it is

[1] I Dig. Int. Law, § 69; Dana's Wheaton, § 23, note; Woolsey, §§ 40, 180; Bluntschli, §§ 28–38; 33 Albany Law Journal, p. 125; I Halleck, pp. 68–72; Boyd's Wheaton, § 27; Hall, pp. 31-42; the *Santissima Trinidad*, 7 Wheaton, 337; vol. ii. Revue de Droit International, pp. 452–485.

[2] The United States complained —it must be admitted without good or sufficient reason—at the recognition of the belligerency of the Confederate States. This seems strange, as the Federal Government had already accorded belligerent rights to the insurgents by its avowed determination to attempt the suppression of the rebellion by a resort to the use of its land and naval forces, and by its conduct of the military operations in accord-

calculated to give rise to strained relations with the government of the insurgents in the event of its independence being recognized.[1]

Recognition of Independence. In addition to the recognition of belligerent rights in behalf of an insurgent government, a state may, and, in the case of a successful rebellion, must, sooner or later, recognize the independence of the state which has come into being as the result of an exercise of the right of revolution. If the independence of the new state be recognized during the continuance of hostilities, the parent state may regard it as an unfriendly, or even as a hostile act. Such recognition, however, in some form is a necessary prelimi-

ance with the laws of war.—Hall, pp. 39–42; Woolsey, § 180; Proclamation of President Lincoln, April 19, 1861, 12 Stat. at Large, p. 1258.

[1] The policy of most modern states in the matter of recognizing the belligerency of revolted communities is one of extreme conservatism. This for the reason that neutral rights and obligations come into operation as a consequence of such recognition, and with them the onerous restrictions upon the maritime commerce of neutral states which are incident to a state of war. This is shown in the failure of the United States to accord such recognition to any of the numerous insurrectionary movements in the island of Cuba, some of which have come very near to fulfilling the essential conditions of belligerency, and many of which have appealed strongly to the sympathies of the American people.—Hall, pp. 31–37; I Dig. Int. Law, § 60. When a civil war rages in a foreign nation, one part of which separates itself from the old established government and erects itself into a distinct government, the courts of this country must view such newly-constituted government as it is viewed by the legislative and executive departments of the Government of the United States.—United States *vs.* Palmer, 3 Wheaton, 610. If the government remains neutral, but recognizes the existence of a civil war, the courts of the country cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.—Ibid. Though the independence of Buenos Ayres has not been acknowledged by the United States, we have recognized the existence of a state of civil war between Spain and its colonies, and each party to that war is respected by us in its exercise of all belligerent rights, including the right of capture.—The *Santissima Trinidad*, 7 Wheaton, 283 [337]. To create the right of blockade and other belligerent rights, as against neutrals, it is not necessary that the party claiming them should be at war with a separate and independent power; the parties to a civil war are in the same predicament as two nations who engage in a contest and have recourse to arms.—Prize Cases, 2 Black, 635.

nary to the admission of the new state into the family of nations.[1]

The Right to Declare War, or to Initiate Hostilities, in Whom Vested. The right of declaring war is an essential attribute of sovereignty. It is the act of the supreme governmental authority of a state, and is limited in its exercise, if at all, only by the constitution or fundamental law of the state by whom, or in whose behalf, it is exercised. In former times the power to declare war, or otherwise involve a state in hos-

[1] France not only recognized the belligerency and independence of the United States, but concluded a treaty of alliance with that power, in consequence of which the military and naval forces of France were employed in co-operation with those of the colonies in the prosecution of the War of the Revolution. — I Halleck, p. 72; Boyd's Wheaton, §§ 21a, 27d–27f; Woolsey, § 40; Hall, pp. 90–94; I Dig. Int. Law, § 70; Creasy, pp. 670–677. Prior to the outbreak of war between the United States and Spain, the belligerency and also the independence of the people of the Island of Cuba were recognized by the Congress of the United States in the following Joint Resolution: "Whereas, The abhorrent conditions which have existed for more than three years in the Island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battle-ship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and cannot longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited: Therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, First, That the people of the Island of Cuba are, and of right ought to be, free and independent.

"Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

"Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry these resolutions into effect.

"Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people."—Joint Res. No. 21, April 20, 1898; 30 Stat. at Large, p. 738.

tilities, was vested in the sovereign; the present tendency is to restrict his power in this regard, usually by requiring such declaration to be made, or sanctioned, by the supreme legislative authority; this is especially the case in states in which representative institutions exist. In the United States the power to declare war is vested, by the Constitution, in the Congress;[1] but as it may exist without being declared—as in case of invasion by a foreign power, or when insurrection or rebellion exists—it may be met and repelled by the President, as the constitutional commander-in-chief.[2] The power to declare war, or to recognize its existence, was formerly delegated to colonial governments, and even to commercial companies; such delegation of authority, however, is no longer recognized, and the power to initiate hostilities is now held to be exclusively lodged in the central government of the state. This does not prevent distant dependencies from recognizing the fact of war, if declared by another power; and they may resist invasion, or even carry the war into the territory of the enemy.[3]

Formal Declaration of War. In former times war was declared with great formalities. This is no longer the case, the formal declaration having ceased when the necessity for its existence had passed away. When the relations of two states become strained the fact is at once known throughout the

[1] Constitution of the United States, article i. § 8, par. 11. Congress may authorize general hostilities, in which case the general laws of war apply to our situation, or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.—Talbot *vs.* Seeman, 1 Cranch, 1 (28).

[2] The Prize Cases, 2 Black, 635, 668. A state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and a foreign war.—Prize Cases, 2 Black, 635. The United States may be engaged in war, and have all the rights of a belligerent, without any declaration by Congress. — The *Amy Warwick*, 2 Sprague, 123. Upon a declaration of war the President has an authority, as incident to his office, to employ all the usual and customary means, acknowledged by the law of nations, to carry it into effect.—Cargo of Ship *Emulous*, 1 Gallison, 563.

[3] Boyd's Wheaton, §§ 294–297; I Halleck, p. 474; II Twiss, § 29; III Phillimore, pp. 77, 78, 153; II Ortolan, p. 11; Woolsey, § 120; Risley, pp. 77–82; Creasy, pp. 405, 406; II Ferguson, § 173. For cases of hostilities without declaration of war, see vol. xvii. Revue de Droit International, pp. 19–49.

civilized world, and the subjects of the unfriendly powers have sufficient time to arrange their business affairs, and to accommodate their legal relations to the changed conditions. When all attempts at peaceable adjustment have failed, diplomatic intercourse ceases, ministers are withdrawn, and the military and naval forces of the belligerents are mobilized and placed upon a war footing. So far as the opposing nations are concerned, no further declaration is now necessary.[1]

Official Notification of an Intended Resort to War. Although the practice of making formal declarations no longer obtains, a state which assumes a belligerent attitude towards another is obliged to give public notice of its intention in each of the following cases: 1st. To its own subjects; 2d. To neutrals. This notice is frequently given by proclamations, which contain a statement of the cause of the war, and of the purposes, or motives, for which it is undertaken. They also contain the date after which a state of hostility will legally exist. This is a matter of great importance, in that it enables neutral powers to give effect to their neutrality laws, to issue proclamations of neutrality, and to fix the date upon which their neutral obligations become binding. No declaration, or notice, is required from the state which acts on the defensive.[2]

[1] III Phillimore, pp. 85–105; I Halleck, pp. 476, 477; II Twiss, pp. 64–68; Levi, p. 281; Boyd's Wheaton, §§ 297, 297a; Hall, pp. 374–382; II Ortolan, pp. 11–24; II Ferguson, pp. 262–267; Walker, Manual, p. 104; Lawrence, Int. Law, § 161. The following is the text of the Declaration of War against Spain, adopted by the Congress of the United States on April 25, 1898 (30 Stat. at Large, p. 364):

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, Anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain. Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect. Approved, April 25, 1898." For examples of hostilities without declaration of war, see vol. xvii. Revue de Droit International, pp. 19–49.

[2] Vattel, liv. iii. chap. iv.; II Ferguson, pp. 262–267; Hall, pp. 380–382; II Ortolan, pp. 11–24; II

Effects of a State of War. The direct effects of a state of war are: 1st. To place both the belligerent states and their subjects in a condition of non-intercourse with each other. 2d. Each citizen of one state becomes the legal enemy of every citizen of the other.[1] This state is *legal*, not *actual*, for no subject of either state can take the life of an enemy, or make captures on land or sea, or do any hostile act, without the express authority of his government. Commercial intercourse between subjects of the belligerent states becomes illegal. Contracts and other legal obligations are suspended during the continuance of hostilities, and a similar rule is ap-

Twiss, pp. 64–78; Boyd's Wheaton, §§ 297, 297a; I Halleck, pp. 476–479; Levi, p. 281; Walker, Manual, pp. 104, 105; III Phillimore, pp. 105–113. For manifestoes of Chili and Peru at the outbreak of the war of 1878, see Foreign Relations of the United States, 1879, pp. 168, 867, 874; for the case of Russia in 1877, see Foreign Relations of the United States, 1877, p. 470.

[1] In a state of war, the nations who are engaged in it, and all their citizens or subjects, are enemies to each other.—Jecker *vs.* Montgomery, 18 Howard, 110. When international wars exist, all commerce between the countries of the belligerent, unless permitted by the sovereign, is contrary to public policy, and all contracts growing out of such commerce are illegal.—Coppel *vs.* Hall, 7 Wallace, 542; United States *vs.* Grossmeyer, 9 Wallace, 72; Planters' Bank *vs.* St. John, 1 Woods, 588; The Schooner *Rapid*, 1 Gallison, 295; the *Hoop*, 1 Rob. Adm. Rep. 196, Bynkershoek, Quest. Pub. Jur. lib. i. chap. 3; Cramer *vs.* United States, 7 Court of Claims, 302; Matthew *vs.* McStea, 1 Otto, 7; III Phillimore, pp. 127–144; I Halleck, pp. 480–484; Boyd's Wheaton, §§ 298–304a; Levi, pp. 281–285; Walker, Manual, pp. 106–111; Hall, pp. 387–393; Manning, pp. 166–177; Lawrence, Int. Law, §§ 162–165. War puts every individual of the respective governments, as well as the governments themselves, in a state of hostility with each other. All treaties, contracts, and rights of property are suspended. The subjects are in all respects considered as enemies. They may seize the persons and property of each other. They have no *persona standi in judicio*, no power to sue in the public courts of the enemy nation. It becomes in the highest degree criminal to comfort or aid the enemy. — The Schooner *Rapid* and cargo, 1 Gallison, 303. It may be averred as a part of the law of nations — forming a part, too, of the municipal jurisprudence of every country—that in a state of war between two nations, declared by the authority in whom the municipal constitution vests the power of making war, the two nations and all their citizens or subjects are enemies to each other. The consequence of this state of hostility is, that all intercourse and communication between them is unlawful.—Jecker *vs.* Montgomery, 18 Howard, 110, 112.

plied to partnerships and other business arrangements. Shares in the public stocks of either state, which are held in the territory of the other, are not confiscated or forfeited. Interest ceases to be paid at the outbreak of hostilities, but is resumed at the establishment of peace, the interest accrued during the war becoming payable at its close.[1]

Citizens of one belligerent power in the territory of the other at the declaration of war may be required to depart, or may be permitted to remain, at the discretion of the state in whose territory they are resident.[2] The latter course has been pursued in most recent wars, and is the one most in accordance with the dictates of humanity. This question has frequently been made the subject of treaty stipulation. It is now generally recognized, however, that such persons are not to be made prisoners of war, and, if ordered to depart, they are to be given a reasonable time for removal with their property and effects. Subjects of the enemy who are permitted to remain in a belligerent state may be subjected to such special police regulation and supervision as may be deemed necessary by the government for its security. For reasonable cause they may be required to depart, or may be forcibly expelled. If they give aid or information to the enemy, or to their own government, they become subject to the laws of war, and may be treated, according to the nature of their offence, as prisoners of war, or as traitors or spies, and may be punished accordingly.

The Property of Enemy's Subjects. The property of enemy's subjects found within the territory of a state at the out-

[1] Manning, pp. 175, 176; Vattel, liv. iii. chap. v. § 77; Brown *vs.* U. S. 8 Cranch, 140; III Phillimore, §§ 87-89; IV Calvo, §§ 1916-1924; II Twiss, § 58; Dana's Wheaton, § 308, note 157.

[2] Boyd's Wheaton, § 304a, note. For a discussion of the right of the sovereign power of a country to require the services of all its citizens in time of war, see *The Joseph*, I Gallison, p. 545. The duty of a citizen, when war breaks out, if it be a foreign war, and he is abroad, is to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable.—The *William Bagaley*, 5 Wallace, 377; IV Calvo, §§ 1912-1914; Hall, § 126; I Halleck, pp. 483-487; Manning, pp. 170-175.

break of war is not confiscable.[1] Debts due an enemy's subject are suspended during the war, but resume their obligatory character at its termination. "The right of the original creditor to sue for the recovery of his debt is not extinguished by the war, and revives in full force on the restoration of peace."[2] "The debts due by American citizens to British subjects before the war of the Revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for their recovery, on the restoration of peace between the two countries. The commercial treaty of 1794 also contained an express declaration that it was unjust and impolitic that private contracts should be impaired by national differences; with a mutual stipulation that neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor moneys which they may have in the public funds, or in public or private banks, shall ever, in any event of war or national differences, be sequestered or confiscated."[3]

"Some writers have drawn a distinction between debts due from a subject of one belligerent to a subject of the other, and debts due from a belligerent state to subjects of the other. It is said that there exists a right to confiscate the former, while the latter are to be exempt. The Confederate States acted upon this distinction, and confiscated all property and all rights, credits, and interests held within the confederacy by or for any alien enemy, except public stocks and securities. Lord Russell strongly protested against this, as being an act as unusual as it was unjust."[4]

[1] Walker, Manual, § 48; the *Sarah Starr*, Blatch. Prize Cases, 650; Manning, pp. 171–175; I Halleck, pp. 485–497; III Phill. pp. 130–145; Hall, pp. 387–393; Boyd's Wheaton, §§ 298–304a; Lawrence, Int. Law, §§ 195–198; III Dig. Int. Law, § 337.

[2] Boyd's Wheaton, § 305; I Halleck, pp. 487–491; Dana's Wheaton, § 308, note 157.

[3] Boyd's Wheaton, §§ 305–308a; Brown *vs.* U. S. 8 Cranch, 110; Manning, pp. 175, 176.

[4] Parliamentary Papers, 1862, "Correspondence Relating to the Civil War," p. 108. Enemy property found in the United States, on land, at the commencement of hostilities, cannot be condemned without a legislative act authorizing its confiscation. An act declaring war is not such an act.—Brown *vs.* United States, 8 Cranch, 110.

"But this is the only instance in recent times of such measures having been adopted, and it is an example that seems unlikely to be imitated. The confiscation of private debts of any sort, besides exposing the state doing so to retaliation, only cripples the enemy in a very indirect way. It has no effect at all on the military or naval operations of the war, and cannot, therefore, be justified on any principle."[1]

Effect of War upon Treaties of Alliance, Guarantee, and Subsidy. Treaties of alliance, of subsidy, and of guarantee, made in anticipation of war, come into effect the moment war is declared by, or against, one of the allied states. Each state which is a party to a treaty of alliance must decide for itself whether the case contemplated by the treaty exists or not. If its decision be affirmative, its obligations as an ally go into effect immediately. If it decides in the negative, its action cannot be constrained by any method short of reprisals or war. The other allies, however, may look upon its failure as a violation of treaty stipulation, which they may regard as a just cause for war. A treaty of subsidy obliges a state to grant such aid in troops, supplies, or money as it may have stipulated to furnish, either on formal notification, or when a particular state of affairs exists which was contemplated by the treaty. In this case, as in that of an alliance, each contracting party decides for itself whether the case exists which is contemplated by the treaty, and each is fully responsible for its decision. The aid agreed upon is furnished strictly in accordance with the provisions of the treaty of subsidy, and the obligation incurred is fulfilled when the stipulated duty has been performed.

[1] Boyd's Wheaton, § 308a; see also authorities cited in note 1, page 283. In the case of the *William Bagaley* it was held by the Supreme Court of the United States that personal property left in a hostile country by an owner who abandons such country in order to go to the other belligerent, and so to return to his proper allegiance and soil, becomes, unless an effort is made with promptitude to remove it from such country, impressed with its character, and as such liable to the consequences attaching to enemy's property.—The *William Bagaley*, 5 Wallace, 377. The presumption of the law of nations is against an owner who suffers such property to continue in the hostile country for a considerable length of time.—Ibid.

If the assistance proves inadequate to the purpose, or if it be impossible of fulfilment, no obligation rests upon the subsidizing state to render other or further service of the same kind.

Treaties of guarantee, in so far as they relate to war, usually consist in an obligation, assumed by one or more states, to enforce respect for the neutrality of a third state, or to assure the existence of such a state within certain territorial limits. They become effective when the neutrality of the protected state is threatened from any quarter, or when the guaranteed territory is invaded, or menaced with invasion. Subsidiary treaties may also exist, providing in detail for interference in either of these cases. If such treaties exist, they must be strictly observed in making good the guarantee.[1]

The effect of war upon treaties generally has already been discussed.[2]

THE LAWS OF WAR

Character and Tendency of the Laws of War. That department of international law which treats of the manner in which war shall be carried on by belligerents, on land and sea, is called the *Laws of War*. These laws are undergoing constant modification, to adapt them to the ever-changing conditions of modern warfare. The tendency of these changes is, and always has been, in the direction of greater humanity and liberality. Harsh usages are modified, cruel practices become

[1] Vattel, liv. iii. chap. vi. §§ 78–102; I Halleck, pp. 235–237; II Phillimore, pp. 80–88; II Ortolan, pp. 76, 77; Klüber, §§ 148, 149, 157–159; Bluntschli, §§ 446–449; II Dig. Int. Law, §§ 148, 150f.

[2] See the title "Termination of Treaties" in the chapter entitled "Treaties and Conventions." See also Hall, pp. 382–389. The termination of a treaty by war does not divest rights of property already vested under it. Treaties stipulating for a permanent arrangement of territorial and other national rights are at most suspended during war and revive at peace, unless they are waived by the parties, or new and repugnant stipulations are made. — Society, etc. *vs.* New Haven, 8 Wheaton, 464; Walker, Manual, § 46; III Phillimore, pp. 792–811; I Halleck, p. 497; Woolsey, § 160; Boyd's Wheaton, § 275; Lawrence. Int. Law, §§ 166, 167, 168; II Dig. Int. Law, § 135; III Ibid. §§ 336–337a.

obsolete, or are abandoned by treaty or general consent, and new methods are constantly suggested for diminishing the inevitable hardships of war. This improvement is observable in many directions; it is most remarkable, however, in the treatment of individuals, combatant and non-combatant, in the theatre of war, and in the greater consideration shown to the wounded and prisoners of war.[1] There has been the least progress in the rules relating to private property on land and sea. The Declaration of Paris restrains the states who were parties to it from capturing private property at sea, except enemy goods in enemy ships and contraband of war. The practice of privateering has declined, probably never to be revived. In war on land pillage is sternly forbidden, but private property may still be taken by way of requisition. Contributions are still recognized, and certain kinds of property may be captured and destroyed, or regarded as booty.

There are no indications, at present, that belligerents will voluntarily surrender any of the rights which they now exercise over private property on land. In the few instances in which such property has been exempted from capture or requisition its immunity has been due to the fact that, in those instances, rapidity of movement was an essential condition of success, which could not have been attained had the force employed, in the particular undertakings, been compelled to depend for its subsistence upon the slow and uncertain methods of requisitioning supplies from an unwilling or hostile population.[2] The recommendations of the conferences at Brussels and St. Petersburg illustrate these tendencies. The declarations on the subject of combatants and non-combatants, the

[1] II Ferguson, § 169; III Phill. pp. 77–84; Creasy, pp. 375, 376; Manning, pp. 196–206; Woolsey, §§ 130, 131; Lawrence, Int. Law, § 184.

[2] For histories of the laws of war, see vol. xxi. Revue de Droit International, 385. For attempts to codify the laws of war, see Dr. Lieber's Instructions to Armies of the United States, Appendix A; see also vol. xxv. Revue de Droit International, pp. 321–338; xxvi. Ibid. pp. 586–605; VI Pradier-Fodéré, §§ 2651, 2652. For the Laws and Usages of War on Land, adopted by the Peace Conference at The Hague on July 29, 1899, see Appendix E.

treatment of wounded men and of prisoners of war, are plain and positive in character, and commend themselves to all nations. Those on the subject of private property are brief, obscure, and unsatisfactory, reflecting but too clearly the opinions upon that subject of those who framed them.

Subjects Treated. The laws of war have chiefly to do with the following subjects:

(*a.*) The forces that may be employed in war, on land and sea.

(*b.*) The methods of carrying on war.

(*c.*) The instruments that may be employed in war.

(*d.*) The treatment of the public and private property of the enemy.

(*e.*) The treatment of non-combatants in the theatre of military operations.

(*f.*) The treatment of captured persons, or prisoners of war.

(*g.*) Crimes and offences against the laws of war; retaliation.

(*h.*) The government of occupied territory.

(*i.*) The intercourse of belligerents in war.

(*j.*) The termination of war; cartels, capitulations, and treaties of peace.

THE FORCES EMPLOYED

Extent of the Right to Use Force. International law recognizes the fact of war, and sanctions a resort to hostile methods to obtain redress for an international wrong. It does not sanction or approve acts of indiscriminate violence, however, nor the use of force in excess of the precise amount needed to redress the injury, or its continued use after the legitimate purpose of the war has been accomplished.[1]

Status of Hostility. It has already been seen that the existence of a state of war makes each subject of one belligerent

[1] Lawrence, Int. Law, § 185; Woolsey, § 131; II Ferguson, § 171; IV Calvo, §§ 2033–2043; Klüber, § 243; Heffter, § 119; Hall, §§ 127, 177; Creasy, §§ 385–389; Risley, pp. 106, 107. Instructions for Government of the Armies of the United States, par. 16 (Lieber).

the legal enemy of every subject of the other. An individual domiciled in a belligerent state becomes an enemy, his property becomes enemy property, and, as an enemy, he ceases to have a legal status in the courts of the hostile state. This is a consequence of the relation of the belligerent states to each other. The states are at war, and so the individual units who compose them must share the same hostile relation. This state of individual hostility, however, is *legal*, not *actual*, and does not, of itself, justify a subject of either state in taking the life of an enemy, in making captures, or in doing any act of hostility whatsoever. Upon this point the international usage is plain. No individual is permitted to commit any hostile act, save in self-defence, without the positive, express authorization of his government. Whoever undertakes an act of hostility without such authorization does so at his peril, and if captured is not entitled to the protection of the laws of war.[1]

Forces Employed on Land. In general war is carried on by the regular armed force of each belligerent power. The character of that force, and its composition, are internal questions, to be determined by the municipal law of every state. In addition to its regular armed force a state may call into its service, for the period of the war, or for a shorter term, such additional forces as it may deem necessary to prosecute the war successfully. This force may consist of conscripts, of volunteers, or of such militia or reserve forces as are, or may be, provided for by its constitution and laws. This force must, in general, be organized and disciplined, commanded by responsible officers, and should either be uniformed, or required to wear some distinguishing mark or badge by which its members may be recognized and known.[2]

[1] II Halleck, pp. 2–20; Boyd's Wheaton, § 356; Woolsey, §§ 125–127; III Phill. pp. 150–153; Manning, pp. 206–209; par. 57 Instructions for Armies of the United States, etc. see Appendix A.

[2] Vattel, liv. iii. chap. xv. §§ 223–228; III Phillimore, pp. 150–152; Risley, pp. 108, 109; Hall, pp. 394, 397; Woolsey, § 125; Boyd's Wheaton, § 356; Klüber, § 267; II Ferguson, pp. 291–294; Walker, Manual, pp. 134–137; II Halleck, pp. 2–6; Brown *vs.* U. S. 8 Cranch, 133; Talbot *vs.* Jansen, 3 Dallas, 160; IV Calvo, §§ 2044–2064; VI Pradier-Fodéré, §§ 2721–2732; Lawrence, Int. Law, § 170; Art. I. Convention

Partisans are soldiers, armed, and wearing the uniform of their army, but belonging to a corps which acts detached from the main body, for the purpose of conducting minor operations of war, such as the obtaining of information, the capture of convoys and supply trains, and of making inroads into the territory occupied by the enemy. If captured they are entitled to all the privileges of prisoners of war.[1]

A *Levée en Masse* is a general rising of the population of a state to resist an invader. Such risings usually take place with the consent, and by the direction, of the government of the invaded state, and there may or may not be time for the movement to be organized and regulated by the government. In such cases the question arises: Are the individual members of such a body entitled, if captured, to be treated as prisoners of war? The weight of opinion is that they are, so long as they observe the laws of civilized war in conducting their operations. Two views have been entertained upon this subject. One, maintained by states having large standing armies, and whose military operations are more likely to be offensive than defensive, holds that such risings are unauthorized. This view is largely influenced by self-interest. The other, held by states maintaining small military establishments, and so more concerned with *defensive* than *offensive* operations, justifies them on the grounds of necessity and self-defence. The latter view is now held by the greater number of states. Of those which maintain the former opinion the two most important, Prussia and Russia, have each, at different times, authorized such risings during invasions of their territories.[2]

of the Hague, 1899. Troops alone carry on the war, while the rest of the nation remain in peace. And the necessity of a special order to act is so thoroughly established that, even after a declaration of war between two nations, if the peasants themselves commit any hostilities, the enemy shows them no mercy, but hangs them up as he would so many robbers or banditti. —Vattel, liv. iii. chap. xv. §§ 226, 231.

[1] Risley, p. 110; par. 81 Instructions for United States Armies in the Field (G. O. 100, A. G. O. 186, 3); II Halleck, pp. 6, 7; General Halleck confounds "partisans" and "guerillas" under the same designation. The true distinction is that stated in the text: partisans act with the authorization of their government; guerillas do not.

[2] Prussia in 1807, during the Na-

Employment of Individuals of Semi-civilized Races. The use of native allies in operations against barbarous enemies who do not recognize the rules of civilized warfare is determined by the rule already stated; such forces must be organized, disciplined, and uniformed, and commanded by officers who are capable of enforcing obedience to the laws of war. Their number bears, in general, but a small proportion to the aggregate of forces employed, and they are used chiefly as guides and scouts in the conduct of minor military operations.[1] The indiscriminate employment of savages,

poleonic wars. Russia in 1700 and again in 1812; on the former occasion to resist Charles XII. and on the latter to resist Napoleon. See also Risley, p. 111; II Halleck, pp. 7, 8; Creasy, pp. 483, 487. At the Brussels conference, in 1874, a proposition was submitted requiring such general levies to conform to certain conditions, in order to secure for them the protection of the laws of war. These conditions were:

"Art. IX. 1. That they have at their head a person responsible for his subordinates.

"2. That they wear some distinctive badge recognizable at a distance.

"3. That they carry arms openly; and,

"4. That, in their operations, they conform to the laws and customs of war. In those countries where the militia form the whole or a part of the army they shall be included under the denomination of army.

"Art. X. The population of a *non-occupied* territory, who, on the approach of the enemy, of their own accord take up arms to resist the invading troops, without having had time to organize themselves in conformity with Article IX., shall be considered as belligerents, if they respect the laws and customs of war."[a] See also Art. II. Convention of The Hague, 1899, which are, to a great extent, based upon the recommendations of the Brussels Conference.

The effect of these rules is made to depend upon the meaning attached to the term "occupied territory," as used in a previous article. It is defined in Article I. to be "territory actually placed under the authority of the hostile army." And the occupation is declared to extend to those territories "where this authority is established and can be exercised."[b] The construction of the term is left to the belligerent invader, and, so long as the views held upon the subject of occupation are so divergent as they are at present, it is quite likely that the rules of the conference, humane as they are in many respects, will receive somewhat discordant interpretations.

[1] Such are the native forces employed by Great Britain in India, China, Africa, and the West Indies; a similar employment of Indian scouts in operations against hostile Indians is authorized by law in the United States. See also Risley, p. 126; II Walker, pp. 341–343.

[a] "Proceedings of Brussels Conference, 1874," Articles IX. and X.

[b] Ibid. Article I.

whose operations cannot be controlled by the belligerent who avails himself of their services, has never been recognized by international law.[1]

Guerillas. The term *guerilla* is applied to persons who, acting singly or joined in bands, carry on operations in the vicinity of an army in the field in violation of the laws of war. They wear no uniform, they act without the orders of their government, and their operations consist chiefly in the killing of picket guards and sentinels, in the assassination of isolated individuals or detachments, and in robbery and other predatory acts. As they are not controlled in their undertakings by the laws of war, they are not entitled to their protection. If captured, they are treated with great severity, the punishment in any case being proportioned to the offence committed. Their operations have no effect upon the general issue of the war, and only tend to aggravate its severity. Life taken by them is uselessly sacrificed, and with no corresponding advantage.[2]

Forces that may not be Used in War. In carrying on military operations against a belligerent, a state may not use, as a part of its armed force, any persons or corps that are not, or cannot be, subjected to military discipline, or who cannot be restrained from committing acts of cruelty in violation of the laws of war. This restriction prohibits the use of bodies of troops composed of individuals of savage or semi-civilized races, whose cruel instincts lead to the perpetration of all sorts of barbarities. A general who finds the force of his ene-

[1] III Phillimore, p. 155. It was such employment which gave occasion for Lord Chatham's censure: "But who is the man that has dared to authorize and associate with our arms the tomahawk and scalping-knife of the savage? to call into civil alliance the wild and inhuman savage of the woods; to delegate to the merciless Indian the defence of disputed rights; and to wage the horrors of his barbarous war against our brethren? These enormities cry aloud for redress and punishment, and, unless done away with, will leave a stain on the national honor."—Speech of Lord Chatham, II Adolphus, History of England, p. 485. See also IV Calvo, §§ 2056, 2057; VI Pradier-Fodéré, § 2727.

[2] Walker, Manual, pp. 135–138; II Halleck, pp. 6, 7; III Phillimore, p. 164; Instructions for the Government of the Armies of the United States, pars. 82, 84; Risley, pp. 110, 111, 126; VI Pradier-Fodéré, § 2730.

my composed of such elements is justified in resorting to retaliatory methods to compel its discontinuance.[1]

Wars with Savages. Civilized states, in carrying on necessary wars with barbarous races, or against nations which are partly civilized, but who do not understand, and so fail to observe, the laws of war, have peculiar duties and responsibilities towards such opponents. Their irregular and barbarous usages should be carefully studied, and the operations undertaken against them should be so planned and arranged as to render it impossible for serious violation of the rules of war to occur. The task is not one of serious or particular difficulty. Barbarous nations yield only to superior force or superior cunning. They violate the rules of civilized warfare chiefly in their cruel treatment of wounded and unwounded prisoners, and in their tendency to indiscriminate slaughter, pillage, and destruction while passing through inhabited districts. To remedy this, the forces employed against them should be of sufficient strength to accomplish the legitimate purpose of the war as expeditiously as possible. Forces inferior in strength to the enemy should never be employed. Wounded men should not be permitted to fall into their hands; straggling should be rigidly prohibited; small, isolated parties should not be employed beyond the lines of the army; and the tactical units of the invading force, in all marches and military operations, should be required to keep within supporting distance of each other.[2]

Forces Employed at Sea. In conducting naval operations and in effecting captures at sea, a state makes use of its public armed vessels, manned by the officers and men of its regular naval establishment. Its naval force may be increased,

[1] To this class belong the Bashi-Bazouks, employed by Turkey, and some of the Cossack mounted forces in the service of Russia. See also Risley, pp. 110, 111; Bluntschli, § 559; III Phillimore, p. 164; Woolsey, § 133; Dana's Wheaton, § 343, note 166; Creasy, pp. 429–432; VI Pradier-Fodéré, § 2727; IV Calvo, §§ 2049, 2050, 2056, 2057; Field, Int. Code, § 739; I Guellé, pp. 99–101.

[2] Woolsey, § 143; III Dig. Int. Law, § 348a; Risley, pp. 125, 126; "Civilisés et Barbares," vol. xvii.; Revue de Droit Int. pp. 5, 447, 539; xviii. Ibid. pp. 186, 281.

both in ships and men, by methods similar to those resorted to to increase its military strength. It may also make use of privateers.[1]

Privateers or maritime volunteers are armed vessels, commanded by private persons, who receive a commission from a belligerent government authorizing them to make captures of enemy ships and goods on the high seas. These commissions are called *Letters of Marque. Letters of Marque and Reprisal* are commissions of a somewhat similar character, which were formerly issued to private persons, authorizing them to make captures by way of reprisal, and in satisfaction for some injury done them by an offending state. This practice is now obsolete.

Although the practice of privateering is still sanctioned by international law, it seems hardly probable that it will be extensively resorted to in future wars. Its defence has been that it enabled a state which, from policy or want of means, maintained a small standing navy, to make a considerable increase in its naval force at the outbreak of war. This increase, however, was attended with serious disadvantages. The force of privateers could only be used to effect captures of unarmed merchant ships. It was never available for general naval operations, and the damage done to the enemy, however great, was at best but indirect, and did not have the effect of weakening his military power. The belligerent employer of privateers incurred the same responsibility for captures made by these cruisers as it did for those made by its public armed vessels, while its control over their officers and crew was, at best, but feeble and indirect. It had but little security against their aggressions upon neutral rights, while it was absolutely responsible for acts done by them in their exercise of the rights of search and capture upon neutral vessels.[2]

As neutral rights steadily increase, and are more and more

[1] Risley, pp. 111–113; II Halleck, pp. 9–20; Boyd's Wheaton, §§ 357–358a; Woolsey, §§ 127-129; III Phillimore, pp. 533–536; Manning, pp. 156–158; Hall, §§ 180–183; Lawrence, Int. Law, §§ 223, 224.

[2] III Phillimore, pp. 150, 151, 533–536; II Twiss, pp. 374–424; Manning, pp. 156, 157; Hall, pp. 525, 526; Creasy, pp. 557, 558; Dana's Wheaton, § 358, note 173; II Halleck, pp. 12-16; Risley, pp. 112, 113.

strongly insisted upon by neutral nations, the exercise of belligerent rights against them becomes constantly more difficult, involving a knowledge of international law which is rarely possessed by the commanding officers of private armed vessels, and presenting questions of the greatest intricacy and difficulty, which require in their decision the fullest knowledge of the rights and responsibilities of belligerents and neutrals. For these reasons the practice of privateering, which had always been regarded with disfavor, has within the last half century been much less frequently resorted to than formerly. Those states whose policy it is to maintain small naval establishments in time of peace find it possible to increase them, at the outbreak of war, by a resort to methods similar to those made use of in increasing their land forces. Ships are purchased or chartered by the government, and the vessels thus acquired are placed under the command of regular naval officers. Over this force the control of the government is absolute and complete. It possesses the advantage that it can be used in all sorts of maritime undertakings, and is not restricted in its operations to the capture of unarmed merchant vessels.

The practice of privateering has been very much restricted by the operation of the rules of the Declaration of Paris, which will be discussed under the head of maritime capture.[1]

Methods of Carrying on War

General Restrictions. With the strategical and tactical methods resorted to by trained and disciplined armies in their operations against each other, international law has but little to do. Such operations must be carried on in accordance with the principle that no forcible measures against an enemy which involve the loss of human life are justifiable which do not bear directly upon the object for which the war is undertaken, and which do not materially contribute to bring it to an end. International public opinion severely judges useless

[1] III Dig. Int. Law, §§ 383–385; Dana's Wheaton, § 358, note 173; II Twiss, §§ 206, 207; IV Calvo, §§ 2197–2204, 2381–2397, 2548–2552, 2590.

and unnecessary operations, and sharply criticises mistakes and blunders which might have been avoided by a reasonable exercise of foresight and skill, and fixes the responsibility of error, in just proportions, upon the governments which authorize such measures and the generals who execute them.[1]

Rule of Good Faith; Use of Deceit. No measures can be resorted to against an enemy in war which involve a breach of good faith. An attack cannot be condemned, or complained of, because it partakes of the character of a surprise, because it is the duty of a belligerent to exercise such due vigilance as will render such measures abortive. Deceit, in the form of circulating false information in order that it may fall into the hands of the enemy, is justifiable, because it is the enemy's duty to weigh carefully the sources from which he receives intelligence. The services of traitors and deserters may be accepted, and the employment of spies for the purpose of obtaining information is legitimate, but no person can be compelled to act as a spy. The poisoning of wells and springs is prohibited, as it ever has been since the laws of war came into existence. The food and water supply of a besieged place may be shut off, however, with a view to hasten its surrender.[2]

Use of the Enemy's Uniform and Flag. It is forbidden in war on land to make use of the enemy's flag for purposes of deceit. It is also forbidden to use the enemy's uniform except with some distinguishing mark, sufficiently striking in character to attract attention at a distance. On the sea the national flag of a public armed vessel must be displayed before an engagement begins, or a capture is made. These rules are based on the fact that flags and uniforms are used for the purpose of determining the national character of troops in the

[1] Woolsey, §§ 131, 133; II Halleck, pp. 20–22; Risley, pp. 106, 107; Manning, pp. 208, 209; VI Pradier-Fodéré, §§ 2742, 2743; I Guelle, pp. 91–94; vol. ii. Revue de Droit International, pp. 643; iii. Ibid. 288; iv. Ibid. 1, 381; v. Ibid. 321, 366; Art. 23 Convention of the Hague, 1899.

[2] II Halleck, p. 25; Woolsey, § 133; Risley, pp. 119–121; IV Calvo, §§ 2106–2122; VI Pradier-Fodéré, §§ 2747–2753; Hall, §§ 185–188; Bluntschli, §§ 557–565; I Guille, pp. 101–109; Vattel, liv. iii. chap. viii. §§ 155–158; III Dig. Int. Law, §§ 347–349.

field. A violation of these rules indicates a want of good faith, a quality equally obligatory in peace and war.[1]

Giving and Receiving Quarter, and Treatment of Individuals of the Enemy; Forbidden Practices. A belligerent cannot refuse to give quarter, nor can he announce his intention to give no quarter, except in case of some conduct of the enemy in gross violation of the laws of war, and then only in the way of retaliation for similar acts. The practice of firing upon outposts, picket-guards, and sentinels, except for the purpose of driving them in during a reconnoissance, or as a preliminary to a general advance, is strictly forbidden. These individuals of the enemy are particularly helpless. They take no part in operations of an aggressive character, and are always ordered not to attack. They are to resist only when themselves attacked, and yield ground only to a superior force of the enemy.[2]

The rules of war forbid the robbery of individuals of the enemy who fall into the hands of a belligerent. Their clothing and private property are as secure from violent appropriation as are those of non-combatant citizens; arms and articles of public property in their possession become the property of the captor's government—never the private property of an individual. The wounding of prisoners, or the infliction of additional injuries upon those already wounded and helpless, is discountenanced upon pain of death, as offensive alike to humanity and the rules of civilized warfare. The power of these persons to do harm has been destroyed by the fact of wounding, or capture, and their helpless and distressing condition entitles them to the most considerate treatment. A similar reason forbids the use of forcible measures against prisoners

[1] II Halleck, pp. 25–29; Risley, pp. 119–121; Art. 7 Brussels Conference; I Guelle, pp. 102–106; Hall, § 187; VI Pradier-Fodéré, § 2760; Articles 22 and 23 Convention of the Hague, 1899; but see Bluntschli, § 565; who, possibly, confuses the use of false colors at sea with their use on land.

[2] II Halleck, pp. 72–75; Arts. 12 and 13 Brussels Conference; Risley, pp. 124–127; Vattel, liv. iii. chap. viii. § 140; Art. 23 Convention of the Hague, 1899; III Phillimore, § 95; Paragraphs 60–64, American Instructions; IV Calvo, § 2143; Field, Int. Code, pp. 496, 497; Creasy, pp. 442–452; Bluntschli, §§ 580–584.

with a view to extort from them information as to the force, positions, or intentions of the enemy.[1]

Instruments that may be Employed

Instruments of War. In no department of human endeavor has greater ingenuity been displayed, in recent times, than in the invention and improvement of arms, projectiles, and other instruments of war. Their destructive power has kept pace with the increase in their range and efficiency, and with the rapidity with which their fire can be delivered. The result has been to make war so destructive as to shorten its duration, and so to materially diminish the losses incurred in proportion to the forces engaged on either side.[2]

It is not an objection to a weapon or projectile that it is merely destructive. All instruments of war have that character, some of them to a remarkable degree. That one weapon or projectile is more destructive than another simply means that the belligerent adopting it has, to the extent of its superior destructive power, a legitimate advantage over his adversary. The decision as to whether a particular instrument may, or may not, be employed in war will depend upon the wound or injury caused by its use. If the wound produced by it causes unnecessary suffering, or needless injury, it is to be rejected, otherwise not. This rule is applicable to all instruments of whatever character, whether weapons or projectiles, which may be used in war. The application of this rule forbids the use of cutting or thrusting weapons which have been poisoned, or which are so constructed as to inflict a merely painful wound. To this class belong arrows with easily detached heads, etc. The recommendations of the St. Petersburg Conference upon the subject of explosive projectiles, for-

[1] Risley, p. 130; II Halleck, pp. 22, 73, 74; Manning, pp. 210, 211; Woolsey, §§ 131–134; Walker, Manual, pp. 139, 140; III Phillimore, pp. 155–157, 162, 163; Lawrence, Int. Law, § 186; I Guelle, pp. 197, 198; IV Calvo, §§ 2134, 2135.

[2] Boyd's Wheaton, pp. 404, 405; Risley, pp. 113–115; II Halleck, pp. 20, 22; Woolsey, § 133; II Ortolan, pp. 33, 34; VI Pradier-Fodéré, §§ 2754–2757; I Guelle, pp. 91–101; Lawrence, Int. Law, §§ 225–228; IV Calvo, § 2098; Bluntschli, §§ 557–560.

bidding the use of projectiles weighing less than four hundred *grammes* (twelve ounces avoirdupois), has received the general sanction of civilized nations. The adoption of this rule renders unlawful the use of explosive bullets in small-arms.[1] The Declaration of the Hague Conference of 1899 extends this interdiction to include "bullets which expand or flatten easily in the human body, such as jacketed bullets which do not entirely cover the projectile, or are provided with incisions."[2]

The use of hot shot, and of chain and bar shot, has been regarded as questionable by some authors, apparently because their purpose and use was not fully understood. *Hot shot* were used in engagements between forts and wooden ships with a view to set fire to the latter. Their use would still be authorized for the same purpose. *Chain-shot* and *bar-shot* were used in naval engagements for the purpose of cutting away standing rigging and spars. For these objects their continued use would be lawful. As it is impossible to use either form of projectile in modern rifled guns, and as they would be alike ineffective against modern iron-clads, which have no standing rigging, they are now practically obsolete.[3]

Balloons. The employment of balloons for the purpose of obtaining information as to the movements of an enemy, or as a means of communication with a besieged place, is now fully authorized by the laws of war. Officers and others employed in their management are placed upon precisely the same footing as persons engaged in reconnoissance duty, and are entitled to the same consideration; if captured they cannot be regarded as spies, but must be treated as prisoners of war.[4]

Torpedoes. Torpedoes, as instruments of both offensive and defensive warfare, have come into general use within the

[1] Appendix D; III Phillimore, pp. 160–162; I Guelle, pp. 94–96.

[2] For text of this Declaration, see Appendix E; IV Calvo, §§ 2100–2102.

[3] III Phillimore, pp. 153–155; Woolsey, § 133; Risley, pp. 113–115; II Halleck, pp. 20–29; Hefftter, § 125; Klüber, § 244; I Guelle, p. 95; II Ortolan, pp. 30–34; IV Calvo, 2098; VI Pradier-Fodéré, §§ 2754–2757.

[4] Risley, p. 123; Snow, p. 91; Hall, pp. 538, 539; Art. 29 Hague Conference, Parl. Papers, 1871, lxxii.; III Phill. p. 164; VI Calvo, §§ 2096, 2097; I Guelle, pp. 134, 135; VI Pradier-Fodéré, § 2766.

last twenty-five years. That their use has received general sanction is shown by the energetic measures which have been taken by most modern states to equip their navies with them, and to adopt them as an important auxiliary in their systems of coast defence. Military mines, which greatly resemble them in purpose and destructive effect, have been regarded as an essential feature of all systems of permanent fortification since the days of Vauban, and the art of countermining in siege operations has kept pace with the development of military mining as a means of offensive warfare. This is likely to be the case with torpedoes. As new forms are devised, and new methods of applying them are invented, corresponding means of counteracting their effects will be discovered, with the result, it is hoped, of restricting within the narrowest limits their terribly destructive effects. On the other hand, if their offensive use should prove to be capable of indefinite development, and if the coasts and harbors of a state be so skilfully defended with torpedoes and submarine mines as to make it practically impossible for hostile fleets to approach, then the object of the state in defending its ports will have been completely attained, in securing to the inhabitants of its sea-coast towns a practical immunity from hostile attack.[1]

Torpedoes and Mines in Land Operations. The use of mines and countermines in the attack and defence of places is coeval, in its origin, with the science of modern fortification, and has always been regarded as a legitimate method of injuring the enemy. The practice of planting small mines or torpedoes to obstruct the advance of an enemy along main roads or avenues of communication, although infrequently resorted to, would seem to rest on the same grounds as the more extensive practice of mining and countermining. Upon the few occasions in which it has been resorted to, it has encountered such serious opposition as to prevent its coming into general use as an incident of military operations on land.

[1] Woolsey, p. 221, note; VI Pradier-Fodéré, § 2757; United States Foreign Relations, pp. 475, 476; IV Calvo, § 2098.

The expense of establishing the system, and its inefficiency for the purpose to which it has been applied, have also contributed to prevent its adoption as an expedient of civilized warfare.[1]

Effect of Modern Inventions, and of Improved Methods of Attack and Defence. The discovery of new methods of attack and defence, and the improvements which have been made in the range and efficiency of artillery and small-arms since the middle of this century, have served to mark an epoch in the history of modern war. Standing armies and navies are now maintained at a point in numbers, training, and efficiency never before reached, or even attempted, and at an expense which absorbs no inconsiderable portion of the revenues of most modern states. These causes combined have so increased the cost and destructiveness of war as to render its occurrence less frequent, and to materially shorten its duration, while, by reducing the time during which operations are carried on, and territory occupied by invading armies, they have contributed powerfully to restrict its most injurious effects.[2]

The Attack of Places. In the attack of places a distinction is made between forts or fortified places, and what are called open or undefended towns. The latter, if they offer no resistance, cannot be attacked. On the contrary, it is the first duty of the commanding general of the force occupying them to prevent pillage, and to insure public order and the protection

[1] During the Peninsular Campaign of 1862 it was proposed by General Rains, who commanded the rear-guard of Longstreet's corps on its withdrawal from Yorktown, to plant a number of explosive shells in the road along which the Army of the Potomac was expected to advance. General Longstreet, when made aware of the nature of the proposition, forbade its being carried into effect on the ground that he did not "recognize it as a proper or effective method of war." The case was carried to the Confederate Secretary of War, who decided it—not upon its merits, as a legitimate operation of war—but upon the ground that, where two generals differed in opinion in respect to the propriety of a particular operation, the junior should give way to the senior, or, if that course seemed preferable, he should seek an assignment to duty in connection with river and harbor defences, "where such things are clearly admissible."—Vol. xi. ser. i. Official Records of the Union and Confederate Armies, pp. 509–511, 516, 517.

[2] VI Calvo, § 2066; II Ortolan, pp. 30–34.

of private property. Fortified places may be taken by open assault, or may be reduced by regular siege operations. If an open assault be attempted, no notice is given, as surprise in such an operation is an essential condition of success. The very fact of war is a sufficient notice to the non-combatant inhabitants of such places that an attack is at least a probable contingency. If they continue their residence it is presumed that they do so with full knowledge that the place may become the centre of active military operations.

It should be remembered in this connection, however, that peace is the normal state of mankind, and that other than military conditions now prevail in the location, growth, and development of cities and towns. This fact must be recognized by belligerent states, and by their generals commanding in the field. There is scarcely a fortified place now in existence which does not contain a large contingent of non-combatant population, composed, in great part, of persons whose circumstances are such as not to permit them to change their residence at will.

This fact is now considered, in the fortification of important centres, by placing the defensive works beyond the range of siege artillery. The claims of these defenceless persons should constantly be borne in mind by all those who have to do with siege operations, the duty of consideration falling with equal force upon besiegers and besieged. No measures directed against a besieged place are justifiable which are calculated to increase, unnecessarily, the hardships of their already distressing condition. The improved methods of conducting siege operations make it possible to neutralize fortified places by close investment, and to reduce them by restricting the attack to the defensive works alone. Commanding officers of such places are not justified in persisting in the defence when the burden of such defence begins to bear with deadly effect upon their non-combatant population.[1]

[1] Risley, pp. 116–118; II Halleck, pp. 90–93; Woolsey, § 138; Foreign Relations of United States, 1879, pp. 872, 883, 889; IV Calvo, §§ 2067–2097; VI Pradier-Fodéré, §§ 2779–2786; I Guelle, pp. 109–122.

Duty of a Commanding Officer of a Besieged Place in the Matter of Surrender. The questions of defence in the case of a garrisoned fort and a fortified town are by no means the same. Duty may require a commander in the former case to resist to the last; in the latter considerations of humanity enter into the problem of defence, and great weight must be attached to them when the question of surrender is presented to him for decision.

In former times there were instances in which the commanding officer of a besieged place incurred some penalty by protracting his defence beyond the time when such defence could be maintained with any reasonable chance of success. This is no longer the case. The defence of a place is a question over which a besieger has no control. The commanding officer of the besieged place may therefore protract his defence so long as any military advantage accrues to his own government by so doing. When no such considerations are involved, however, and the question of defence is limited to the place itself, a commander is justified in continuing it so long as any hope of success remains. When, in his opinion, it can no longer be hopefully maintained, any further sacrifice of life is unwarranted, and it becomes his duty to surrender. But this is a duty which he owes to his country and to the men under his command, and not to the enemy. If his force is sufficient to justify him in such an undertaking, it is proper for him to make the attempt to cut his way out. Whenever he surrenders he is entitled to demand, for himself and for his command, the rights of prisoners of war, and his enemy is not justified in refusing to grant him such rights, still less in threatening to deny quarter to himself or his garrison. On the other hand, should he blindly refuse to surrender when defence is no longer possible, and so compel his enemy to take the place by assault, he cannot complain of any loss of life that may legitimately ensue, nor can he expect his antagonist, in the heat of an attack, to recognize his tender of surrender when the time for such tender has passed away.[1]

[1] Risley, pp. 124, 125; II Halleck, pp. 90, 91; IV Calvo, § 2138; Snow,

Devastation. The practice of laying waste a portion of the territory of the enemy, as a measure of military necessity, is, at present, happily less frequent than was formerly the case. It was resorted to upon at least two occasions, however, during the American civil war, once by General Sherman, during his march from Atlanta to Savannah, and, subsequently, during his northward march through the Carolinas, and again by General Sheridan in the Shenandoah Valley during the autumn of the year 1864. The rule in respect to the devastation of the territory of the enemy is deduced from the general principle of international law, that, in time of war, a state may resort to such measures, involving the use of force, as are necessary to secure the objects for which the war was undertaken.[1]

"The same general rule, which determines how far it is lawful to destroy the persons of enemies, will serve as a guide in judging how far it is lawful to ravage or lay waste their country. If this be necessary, in order to accomplish the just ends of war, it may be lawfully done, but not otherwise.[2] Thus, if the progress of the enemy cannot be stopped, nor our own frontier secured; or if the approaches to a town, intended to be attacked, cannot be made without laying waste the intermediate territory, the extreme case may justify a resort to measures not warranted by the ordinary purposes of war."[3] Devastation is therefore justified: (1.) When dictated by military necessity, as when property is destroyed in battle

pp. 94, 95. The Duke of Wellington, in a despatch to Mr. Canning bearing date of February 3, 1820, maintained the view that the garrison of a besieged place that refused to surrender could be put to the sword. It is to be said to his credit, however, that he never applied the rule in practice.—Wellington Despatches, vol. i. p. 80, cited by Creasy, p. 452. See also Creasy, pp. 449–452; I Guelle, pp. 109–122; Vattel, liv. iii. chap. viii. § 143; VI Pradier-Fodéré, § 2784.

[1] Risley, pp. 115, 116; Creasy, pp. 531, 532; Par. 14–17 Instructions for the Government of the Armies of the United States in the Field (G. O. 100, A. G. O. 1863); II Twiss, int. chap. pp. xl. xli. 125, 126; Vattel, liv. iii. chap. ix. §§ 161–63; VI Pradier-Fodéré, §§ 2770–2774; IV Calvo, §§ 2215–2217.

[2] Boyd's Wheaton, §§ 347–351a; Vattel, liv. iii. chap. ix. §§ 161–166; Creasy, §§ 503–505; Field, Int. Code, p. 536; Hall, pp. 432, 541; II Ortolan, pp. 35–56; IV Calvo, §§ 2215–2219.

[3] Boyd's Wheaton, § 347.

by the fire of artillery, or by the movement of troops; or where the vicinity of a besieged place is cleared of houses, crops, forests, and the like, in order to facilitate siege operations; or when villages or detached buildings are fired to cover the retreat of an army, or when bridges are destroyed, or canals diverted from their course in order to prevent pursuit. (2.) Where a portion of territory is laid waste by way of retaliation, or, in an extreme case, to prevent an incursion of the enemy, or to deprive him of food and forage necessary for the support of his armies.[1] "Destruction, on the other hand, is always illegitimate when no military end is served, as in the case when churches or public buildings, not militarily used, and so situated or marked that they can be distinguished, are subjected to bombardment in common with the houses of a besieged town."[2] When devastation is occasioned by pillage, or by the wanton destruction of houses, crops, and trees by troops wanting in discipline, it becomes an offence against the laws of war, and its discontinuance may be compelled by measures of retaliation.[3]

Usages of War at Sea. The usages of war at sea are the same in substance as those on land, although, from the circumstances of the case, they are much simpler of application. The same rules apply as to giving and receiving quarter, and as to the treatment of wounded and unwounded prisoners of war. The crews of captured merchant vessels of the enemy are made prisoners of war. When neutral vessels are seized for carrying contraband, or for attempting to violate a blockade, their crews, not being belligerents, are not subject to detention as prisoners of war, unless by their conduct they render such restraint necessary. As to the use of false colors in maritime

[1] Vattel, liv. iii. chap. ix. §§ 142, 166, 167; De Martens, Précis, liv. viii. chap. iv. §§ 279–283; Klüber, §§ 262–265; Hall, pp. 531–534; Par. 15 Instructions for Armies of the United States, etc.; II Twiss, pp. 125, 126; Boyd's Wheaton, §§ 347, 351a; IV Calvo, §§ 2215–2219; Hall, § 186.

[2] Hall, p. 533.

[3] II Halleck, pp. 117–119; Vattel, liv. iii. chap. ix. §§ 167, 168; Hall, pp. 531–535; Boyd's Wheaton, §§ 347–351a; II Twiss, pp. 124, 125; Risley, pp. 115–118; Creasy, pp. 531–534; Articles 22 and 23 Hague Convention of 1899.

warfare, the practice is that a flag other than that of the ship's nationality may be used for purposes of pursuit or escape; all acts of hostility, however, must take place under the proper national flag; the rule being that a vessel cannot attack another, at sea, before having made known its own nationality, and having put the vessel which it encounters in a position to declare its nationality also.[1]

The Public and Private Property of the Enemy

Treatment of Property on Land. The property of an enemy on land may be classified into *public* and *private*. Public property is again classified into—1. Property of a military character, or susceptible of appropriation to military use. To this class belong forts, arsenals, dockyards, magazines, and military stores of all kinds. 2. Money and movables of all kinds belonging to the belligerent government as proprietor. 3. Property essentially civil, or non-military in character, and used for religious, charitable, scientific, or educational purposes. The two former may be captured and destroyed, or converted to the military use of the enemy. The latter is now exempt from seizure, and should be protected by a belligerent if situated in, or near, the theatre of active operations.[2]

[1] Pistoye et Duverdy, Traité des Prises, tit. i. chap. i. The ancient rule of maritime law was that the affirming gun could only be fired under the true national flag.—Valin, Traité des Prises, chap. ii. § 1, par. 9; cited by Halleck, vol. ii. pp. 25, 29. Ortolan says that the affirming gun may be fired under false colors, but that all acts of hostility must take place under the proper national flag.—II Ortolan, liv. iii. chap. i. See also Massé, Droit Commercial, tome i. § 307; Hautefeuille, Droit des Nations Neutres, tome iv. p. 8; Snow, p. 96. Paragraph 273 United States Navy Regulations of 1896 contains the requirement that "the use of a foreign flag to deceive an enemy is permissible, but it must be hauled down before a gun is fired; and under no circumstances shall an officer commence an action, or fight a battle, without the display of the national ensign."

[2] Hall, pp. 416–423; II Halleck, pp. 98–106; Boyd's Wheaton, §§ 352, 355; Risley, pp. 134, 137–139; Walker, Manual, pp. 128–130, 143–145; Manning, pp. 179–183; Snow, pp. 108, 109; Woolsey, § 137; Instructions for Government of Armies of the U. S. etc. sec. ii.; II Twiss, pp. 119–125; Vattel, liv. iii. chap. ix. §§ 160–163; Creasy, pp. 496–514; Dana's Wheaton, § 347 (note), 169; IV Calvo, §§ 2199–2220.

Private property is classified into *real* and *personal.* Real property, whether consisting of land or buildings, is exempt from seizure or destruction, except as a direct necessity of military operations. It may be occupied or used, and during such occupation should be protected from all needless injury and damage. *Personal property* is divided into—1. That which is susceptible of direct military use by a belligerent. To this class belong pack, saddle, and draft animals, means of transportation of all kinds, cattle, fuel, provisions and food products, medicines, forage, cloth, leather, and shoes and the like in general, all articles of wear and supply for men and animals. 2. That which is not susceptible of direct military use, including works of art, furniture, valuables, clothing, and articles of general merchandise. The former may be captured, or taken by way of requisition; the latter is exempt from capture or confiscation. Money may be taken in commutation of requisitions regularly imposed, or by a levy in the nature of a contribution, with the sanction of the state by whose authority it is levied. If personal property be taken by way of pillage, the act is severely punished.

The taking of private property within the limits here described is sanctioned by the law of nations. It is sometimes paid for, more frequently, perhaps, now than formerly, but when compensation is made, it is dictated rather by motives of policy than justice. Illiberal and unjust as the practice may be, it is universally recognized, and so receives the unwilling sanction of international law.[1] The army regulations of all nations provide specifically, and in great detail, for the main-

[1] Boyd's Wheaton, §§ 346, 346a; II Halleck, pp. 108–115; Vattel, liv. iii. chap. ix. §§ 161–168; Manning, pp. 179–183; II Twiss, pp. 119–128; Creasy pp. 514–534; Hall, § 139; Risley, pp. 134, 135, 139–143. What shall be the subject of capture, as against an enemy, is always within the control of every belligerent. It is the duty of his military forces in the field to seize and hold that which is apparently so subject, leaving the owner to make good his claim as against the capture in the appropriate tribunal established for that purpose. In that regard they occupy on land the same position that naval forces do at sea.—Lamar *vs.* Browne, 92 U. S. 157. Unless restrained by governmental relations, the capture of movable property on land changes the ownership of it without adjudication.—Ibid. See also Arts. 46–51 of the Hague Conference of 1899.

tenance of their troops in the enemy's territory, by supporting them, wholly or in part, by requisitions on the country through which they are passing, and prescribe the methods of quartering troops, and of collecting and distributing subsistence and forage.[1]

Requisitions are the formal and regular levies of supplies, made by an invading army for its support, in accordance with the municipal laws and army regulations of the state to which it belongs. These laws, regulations, and orders prescribe the methods in accordance with which the requisitions are to be made. The proportion to be taken from each individual, the articles to be paid for, if there be any such, the tariffs, or rates of payment, and the cases in which receipts are to be given, are stated in such regulations and orders. They also contain provisions denouncing pillage, and prescribing punishments for that offence and for other unauthorized taking of enemy property.[2]

Receipts should always be given for property taken by way of requisition. They are of importance, as payments for stores and supplies thus taken from individual residents of the occupied territory, whether made by the invaders' government or their own, are based upon them; and, if not taken up and paid, they may serve to mitigate the severity of future requisitions by the same invader. Requisitions may be made by commanding officers of any grade, but always in strict accordance with law and regulations. Unauthorized requisitions are usually regarded as acts of pillage, and are punished accordingly.[3]

A question arises as to whether a belligerent can compel the personal services of individuals of the population of the

[1] Hall, §139; Risley, pp. 139–140; Walker, Manual, pp. 143–148; Woolsey, §§ 135–137; Snow, pp. 108–109; II Halleck, pp. 108–109; U. S. Instructions, par. 33; II Twiss, pp. 122–128; IV Calvo, §§ 2220–2229.

[2] Hall, § 140; Risley, pp. 140–141; Woolsey, § 136; Snow, pp. 108–109; II Halleck, pp. 109–114; Manning, pp. 182, 183; Vattel, liv. i. ch. ix. § 165; Articles 56–58 Brussels Conference; Arts. 48–53 Convention of The Hague, 1899.

[3] II Halleck, pp. 113, 114; Article 51 Convention of The Hague, 1899; Hall, § 139; IV Calvo, §§ 2253–2255; Bluntschli, §§ 653–656.

invaded territory. Such services may be voluntary, either on the part of individuals or corporations, and, if so, are paid for in accordance with the agreement in each case. With these international law has nothing to do. The right of a belligerent to take means of transportation, by way of requisition, has always been asserted, and almost invariably acted upon. This involves the right to compel the services of drivers and teams, and also of railway, steamship, and telegraph companies, and of blacksmiths, carpenters, and other tradesmen. These services must be obtained by force, as the duty of a citizen to his own government forbids him to render voluntary service to the enemy. The question of payment is discretionary with the belligerent employer, and, as in the case of other requisitions, is rather a matter of policy, or expediency, than of strict justice.[1]

The policy of the United States in the matter of requisitions has been far from liberal. At the beginning of the campaign in Southern Mexico, General Scott was directed to subsist his troops in the enemy's country. Upon the urgent remonstrances of that officer as to the injustice and impolicy of such a course, the order was rescinded, and the regulation of the matter left to the discretion of the general commanding in the field. He thereupon directed reasonable prices to be paid for such articles as were needed for the subsistence of his army, and experienced so little difficulty in obtaining them as to make a resort to requisitions unnecessary. During the war of the rebellion generals in the field were authorized to seize such articles of subsistence, or forage, as were needed by their commands. For the property thus taken receipts were to be given, payable at the end of the war, upon proof of loyalty.

[1] Hall, pp. 425–427. In January, 1871, the Germans, who were then in military occupation of Nancy, required the services of five hundred laborers upon a work of repairing the railway—of considerable importance to the success of their operations. Notice was given that if they were not forthcoming, at the time indicated, a certain number of the officers and employés would be seized and shot; —Hall, p. 427, note; II Halleck, pp. 110–113, notes; Creasy, pp. 534–535; vol. xx. Revue de Droit Int. pp. 362, 383; xix. Ibid. p. 164; Lawrence, Int. Law, §§ 203, 204; II Guelle, pp. 176–231; IV Calvo, §§ 2242–2244.

If such proof were not produced, no payments were to be made. This amounted, in fact, to the taking of enemy's property without compensation.[1]

Contributions. Contributions are levies of money or supplies, made by the authority of a belligerent government, through the commander-in-chief of its armies in the field. They are levied upon the property, or taxable resources, of a city or district of territory. They are usually assessed, collected, and paid by the local authorities, upon the formal demand of the invading general. If the amount of the contribution be not paid, or delivered, at the specified time, the invader takes such measures as he may deem necessary to enforce his decree. Unlike requisitions they are never refunded, or reimbursed, by the belligerent who levies them, though they may be deducted from the amount of an indemnity proposed to be levied by a conquering invader in the preparation of the treaty of peace.[2]

Captured Property on Land; Booty. Public property on land, and in some instances private property also, may be captured by a belligerent. Such captured property is called *booty*. It consists of all public property that is susceptible of capture in war, and of such private property as is susceptible of direct military use. In strictness all articles that may be obtained by way of requisition fall under the head of booty. Aside from the articles obtained by requisition, booty may consist of arms, ammunition, provisions, and military supplies of all kinds, and of all public and private property captured in battle, or as a direct result of military operations.[3]

[1] Snow, p. 109; II Halleck, pp. 111, 113; IV Calvo, §§ 2242–2255; VII Pradier-Fodéré, §§ 3020–3062.

[2] Hall, pp. 433–435; Risley, pp. 140, 141; Woolsey, § 136; Snow, pp. 108, 109; II Halleck, pp. 109–114; VII Pradier-Fodéré, §§ 3062–3065; II Twiss, pp. 124, 125; Lawrence, Int. Law, § 204; IV Calvo, §§ 2231–2284; Klüber, § 251; Heffter, § 130; Vattel, liv. iii. chap. ix. § 165; Walker, Manual, p. 145.

[3] For the latest authoritative discussion of this subject, see the article, "The Right of Booty in General, and especially the Right of Maritime Capture," by Professor Bluntschli, in the Revue de Droit Int. vol. ix. (1877), p. 508; x. Ibid. p. 60; see also II Twiss, p. 122; Hall, § 435; Risley, p. 141; II Halleck, pp. 115–118; Lawrence, Int. Law, § 199. What shall be the subject of capture, as against the enemy, is always

As is the case with all property which may be captured in war, on land or sea, the title first vests in the captor's government.[1] Such title is held to be complete after twenty-four hours of actual possession, upon the presumption that secure possession will be obtained within that time. The capturing government may make such disposition of this captured property as it deems best. It may convert it to its own use; it may cause it to be sold, and may appropriate the proceeds of the sale to governmental uses; or it may decree the whole, or a part, to the actual captors as a reward for their services. The British Government, in certain cases, recognizes and rewards such services. The Government of the United States has adopted the contrary rule, and appropriates to its own use all property captured by its armies on land.

The rules regarding booty and those regarding the treatment of private property seem to be in conflict. They are not so in fact. Private property on land, however great in amount, is exempt from capture unless it be susceptible of direct military use by a belligerent, or contributes directly to the support and maintenance of his armies. Arms, ammunition, equipments, and all sorts of military stores, clothing, or cloth suitable for uniforms, shoes, leather, blankets, medicines, and food and forage supplies of all kinds, are susceptible of such appropriation. Money, unless by way of contribution, clothing and cloth not adapted for use as uniforms, and all other products, manufactures, and commodities, are exempt from capture, and are entitled to protection by the laws of war.[2]

within the control of every belligerent. It is the duty of his military forces in the field to seize and hold that which is apparently so subject, leaving the owner to make good his claim as against the capture in the appropriate tribunal established for that purpose. In that regard they occupy on land the same position that naval forces do at sea. — Lamar *vs.* Browne, 92 United States, 187.

[1] Unless restrained by governmental relations, the capture of movable property on land changes the ownership of it without adjudication. — Lamar *vs.* Browne, 92 United States, 187; Young *vs.* United States, 97; Ibid. 39, 60.

[2] "The very ground on which a belligerent army must encamp is private property; the crops which it must trample under foot in its march are private property; the

Combatants and Non-combatants. While the entire body of citizens or subjects of the belligerent states become enemies at the outbreak of war, it has been seen that this status of hostility is legal, rather than actual; and that no individual subject of either state can take an active part in military operations, or commit acts of hostility, save with the express consent of his government, as expressed by its taking such citizen into its military service, either by appointment to military office, or by enlistment, or conscription, or by a rising in mass. Persons thus expressly authorized, and no others, may do acts of hostility, or otherwise participate actively in the operations of war.

A *combatant* is a person who, with the special authorization of his government, takes part, either directly or indirectly, in the operations of war. The term includes, in addition to the troops of the line, all staff-officers, surgeons and chaplains, officers and employés of the supply and transport service, all agents, contractors, and others who accompany the army in an official capacity, and who assist in its movement, equipment, or maintenance; and all retainers to the camp.[1]

A *non-combatant* is a resident of a belligerent state who takes no part in the war. He is not subject to the laws of war, and is protected by them, in his person and property, so long as he refrains from participation in military operations.[2]

Treatment of Non-combatants in the Theatre of War. It

farm buildings and the villages which it must devastate and destroy in battle are private property. The vicissitudes of war also must sometimes render the exaction of supplies for the support of an army moving in an enemy's country imperative, even in the case of well-disciplined troops. Respect, therefore, for private property in a continental war must always be a question of degree. To destroy private property, where such destruction is necessary to facilitate the operations of war, is as justifiable, from the necessity of the case, as the destruction of public property; to seize it by way of requisitions, to the extent to which such requisitions are necessary for the support of a belligerent army, is justifiable on the same principle as the war itself on which the army is engaged."—II Twiss, int. chap. pp. 40, 41.

[1] II Halleck, pp. 2–22; Snow, pp. 89, 90; Hall, pp. 394, 395; Risley, pp. 107–114; IV Calvo, §§ 2044–2065.

[2] Hall, pp. 395, 396; II Halleck, pp. 68–73; Snow, pp. 89, 90; Risley, pp. 107, 108.

has been seen that the subjects of two belligerent states become enemies at the outbreak or declaration of war. They continue in this hostile relation during its continuance. This status does not authorize them to commit acts of hostility, however, which can only be undertaken by persons having the express authorization of the belligerent governments. The rest of the population of a belligerent territory are not only forbidden to take an active part in military operations, but are entitled to personal immunity and protection so long as they refrain, in good faith, from taking part in the war. A portion of their property may be taken, with or without compensation, their houses and lands may be occupied, and injured, or possibly destroyed, as a matter of military necessity; but their persons, and such of their property as is not confiscable by the laws of war, are, by the same laws, completely protected. Any offence committed against them, or their property, is an offence against the laws of war, and is promptly and severely punished. This exemption from the operations of war they continue to enjoy so long as they take no active part in hostile operations. If, on the other hand, they take an active part in military operations, with the authority of their government, they become a part of its military force, and are treated accordingly. If they act without such authorization, and in violation of the usages of war, they are no longer protected, but are punished according to the nature and degree of their offence.[1]

Prisoners of War. A *prisoner of war* is a combatant who, by capture or surrender, falls into the hands of an enemy. In strictness an enemy has the right to make prisoners of those persons only whom he may lawfully kill in war. In practice, however, the former class is much more numerous than the latter. This is because the right of making prisoners, as now exercised, inflicts no particular hardship upon the captured person; while his detention, as a prisoner, may serve to ma-

[1] Woolsey, § 135; Risley, pp. 107–108; Hall, pp. 397–398; Instructions for United States Armies, etc. pars. 20–23; VII Pradier-Fodéré, § 3019.

terially injure the enemy, by impeding him in his military operations, or by interfering with the efficient administration of his government. For this reason "he may capture all persons who are separated from the mass of non-combatants by their importance to the enemy's state, or by their usefulness to him in his war. Under the first of these heads fall the sovereign and the members of his family when non-combatants, the ministers and high officers of the government, diplomatic agents, and any one who, for special reasons, may be of importance at a particular moment."[1]

Treatment of Prisoners. So soon as an individual of the enemy ceases his armed resistance he becomes vested with all the rights of a prisoner of war. The right to injure him is, at that instant, changed into the duty of protecting him, and of preventing his escape. The public property, arms, equipments, and any articles susceptible of military use, found in the possession of a prisoner at the time of his capture, become the property of the capturing state. His private property is respected, and secured to him, by the usages of war. Were it not so protected every consideration of honor and humanity should deter his captor from any act of aggression towards one who, from his situation, is unable to defend himself.[2]

Prisoners are usually sent to the captor's state, or are removed to points at a distance from the actual theatre of war, where they can be securely held. They are fed and clothed at the expense of the captor's government. They are entitled, in addition to proper food and clothing, to medical attend-

[1] II Halleck, pp. 73–75; Hall, pp. 403–406; Risley, p. 129; Snow, pp. 90–91; Woolsey, § 134; IV Calvo, §§ 2133, 2134; I Guelle, pp. 187–196.

[2] Snow, pp. 98–99; Boyd's Wheaton, § 343; II Halleck, pp. 74–75; Risley, p. 130; Hall, pp. 405-407. A prisoner of war on board a foreign man-of-war, or of her prize, cannot be released by *habeas corpus* issuing from courts either of the United States or of a particular State.—VII Opinions of Attorney-General, p. 122. But if such prisoner of war be taken on shore, he becomes subject to the local jurisdiction or not, according as it may be agreed between the political authorities of the belligerent and neutral power.—Ibid. See also I Guelle, pp. 196–202; IV Calvo, §§ 2134–2146; Articles 5–9 Convention of the Hague, 1899; VII Pradier-Fodéré, §§ 2746–2805.

ance, and to a reasonable allowance of fuel, quarters, bedding, and camp equipage. They are subject to such measures of restraint as are necessary to their safe-keeping; and are held to the observance of such sanitary and police regulations as are made necessary by their confinement. The rules of war authorize a belligerent to require them to perform a certain amount of labor, as a reimbursement of the cost of their support. No labor may be required of them, however, that is calculated to assist the captor, directly, in his military operations. In recent times the practice has been to require no services of prisoners of war except such as have contributed directly to their comfort and welfare.[1]

Prisoners of war are not guilty of a crime in having defended their country. Their confinement, therefore, cannot assume a penal character, but must consist in such measures of detention as will secure them against danger of escape. A prisoner of war, in attempting to escape, does not commit a crime. It is his duty to escape if a favorable opportunity presents itself. It is equally the duty of his captor to prevent his escape, and he is justified in resorting to any measures, not punitive in character, that will best secure that end. A prisoner of war may be killed in attempting to escape. If recaptured his confinement may be made more rigorous than before.[2]

According to the present rule of international law the status of a prisoner of war may be terminated—1. By exchange; 2. By ransom; 3. By the treaty of peace at the end of the war; 4. By a successful escape; 5. By death either in camp or detention or when released on parole.

Internment of Prisoners in Neutral Territory. Combatants who take refuge in neutral territory, to escape capture at the hands of the opposing belligerent, occupy, in some respects, the status of prisoners of war. At the instant of entrance to such territory, and as a necessary consequence of

[1] I Guelle, pp. 200–202; Hall, § 132; IV Calvo, §§ 2147, 2148; Article 6 Convention of the Hague, 1899; VII Pradier-Fodéré, §§ 2805, 2806.

[2] I Guelle, pp. 202–204; Hall, § 132; Risley, p. 131; IV Calvo, § 2150; Article 8 Convention of the Hague, 1899; VII Pradier-Fodéré, § 2822.

their admission, they become subject to the jurisdiction of the neutral state whose hospitality they have thus invoked. They are interned by that government, at such places as it sees fit to designate, and are subjected to such measures of restraint as it may deem necessary to the maintenance of its neutral obligations. They are supported, while so interned, by the neutral government, and the cost of their maintenance is subsequently reimbursed by the government of the state of whose military establishment the interned troops form a part.[1]

Exchange of Prisoners. The exchange of prisoners between belligerents is made in accordance with agreements, entered into for that purpose, called *cartels*. The making of such agreements is purely voluntary, and cannot be constrained by subjecting prisoners to special hardships. The time, place, and method of exchange are fully detailed in the cartels, the provisions of which are always strictly construed. The basis of exchange is usually that of strict equivalents, man for man, rank for rank, disability for disability. The exchangeable values of the different grades of officers and non-commissioned officers are established, and expressed in terms of private soldiers. Numbers are then computed for exchange upon the basis thus agreed upon. An excess on either side may constitute a credit, or may be extinguished by a payment of money. Prisoners of war who escape from confinement, or who are exchanged, are by such acts revested with all the rights of belligerents. The binding force of cartels, like that of all other agreements between belligerents, rests upon the good faith of the contracting parties. If the terms of a cartel are violated by one belligerent they cease to be obligatory upon the other.[2]

[1] After the battle of Sedan, in 1870, considerable numbers of French troops took refuge in Belgian territory, where they were interned and supported by the Belgian Government. As between the signatory parties to that instrument, the subject of the internment of wounded and unwounded prisoners in neutral territory is regulated by the provisions of Articles 57–60 of the Convention of the Hague of 1899.

[2] Hall, pp. 411–413; II Halleck, pp. 75–78; Risley, pp. 130, 131; III Phillimore, pp. 163, 164, 181–184; Snow, pp. 98, 99; Woolsey, § 134; Boyd's Wheaton, §§ 344, 344a; Vat-

Cartel Ships. The use of what are known as "cartel ships" in the conveyance of prisoners of war from one belligerent port to another for purposes of exchange, in pursuance of cartels to that effect, is of relatively frequent occurrence, and is fully sanctioned by international law. Cartel ships, while so employed, are exempt from capture by cruisers of the other belligerent, provided that no contraband articles are attempted to be conveyed as part of their cargo, and the terms of the cartel are otherwise carried out in good faith.[1]

Ransom. The release of prisoners of war in consideration of a payment of money called ransom, was a consequence of the ancient rule by which a person, captured in war, became the property, and, therefore, the slave of his captor. The practice did not come to an end, however, with the extinction of slavery, but continued in existence until relatively recent times, the rule being that a state was bound to secure the release of its subjects who were held by the enemy as prisoners of war. Such release could be effected by exchange, or by ransom, and bases of exchange and ransom were fixed, by cartel between the belligerents, at the beginning of the war. Although the practice has become practically obsolete, certainly so far as civilized states are concerned, the circumstances of future wars may be such as to warrant its recognition in the disposition of prisoners of war.[2]

Paroles. A parole is a promise, either verbal or written, made by an individual of the enemy, by which, in considera-

tel, liv. iii. chap. viii. § 153; I Guelle, pp. 213–215; IV Calvo, §§ 2156, 2157; VII Pradier-Fodéré, §§ 2831–2842; II Twiss, § 178.

[1] The employment to which the privilege of cartel is allowed is of a very particular nature. It is a mode of intercourse between hostile nations invented for the purpose of alleviating, in some degree, the calamities of war, by restoring to their liberty those individuals who may happen to have fallen into a state of captivity. It is for the mutual exchange of prisoners of war, and therefore, properly speaking, it can have place between belligerents only.—*The Rose in Bloom*, I Dodson, 60; III Phillimore, pp. 181–184; Snow, p. 98.

[2] Vattel, liv. iii. chap. viii. §§ 153, 154; Hall, § 134; II Halleck, pp. 75, 76; II Twiss, §§ 177, 178; Manning, pp. 212, 217; Risley, p. 127; Dana's Wheaton, § 344; III Phillimore, p. 164; VII Pradier-Fodéré, §§ 2843–2848; IV Calvo, § 2158.

tion of certain privileges or advantages, he pledges his honor to pursue, or refrain from pursuing, a particular course of conduct. Paroles are ordinarily received only from officers, and, when necessary, are given by officers, for the enlisted men of their commands. They are accepted from enlisted men only in exceptional cases. Paroles are given by officers to secure greater freedom of movement, or to obtain special privileges, while held by the enemy as prisoners of war. These may, or may not, be in writing. They are also given to obtain a release from captivity, with permission to return home. Such paroles are accompanied by a pledge to refrain from taking part in an existing war until regularly exchanged. They are given in writing, usually in duplicate, one copy being retained by the captor, the other by the officer giving the parole. These instruments are obligatory upon the government of the state to which the individual belongs only when accepted, or recognized, by its authority. That government may refuse to permit its officers to give their paroles, when held as prisoners of war, and may refuse to recognize them when given. In such an event, however, it is the duty of the paroled officer to return at once to captivity. As legal instruments paroles lose their binding force—1. Upon the formal exchange of the paroled officer; 2. At the termination of the war.

A *breach of parole* is an offence against the laws of war. Its enormity consists in the breach of good faith that is involved in the commission of the offence. The punishment inflicted is in proportion to the importance of the parole given. The extreme penalty is death, which may be inflicted upon a paroled prisoner who is captured in arms before he has been regularly exchanged.[1]

Crimes and Offences Against the Laws of War.

Nature and Character. Certain acts done, or offences committed, in the immediate theatre of military operations, dur-

[1] Hall, pp. 407-411; II Halleck, pp. 77, 78; Risley, p. 131; Snow, pp. 98, 99; Woolsey, § 134; I Guelle, pp. 204-213; Vattel, liv. iii. chap. viii. § 151; Pradier-Fodéré, §§ 2823-2830; IV Calvo, §§ 2151, 2152.

ing the continuance of hostilities, are regarded by all nations as violations of the laws of war. They are, in fact, crimes at international law, and may be punished by the belligerent who suffers by their commission; and such an infliction of punishment, by one belligerent, furnishes the other with no ground for complaint or retaliation. Offences against the laws of war are triable by the appropriate military tribunals of the belligerent who is injured by their commission; if, however, as is sometimes the case, such tribunals are without jurisdiction to try a particular offence, or a particular offender, the offence may be punished summarily, or the case may be tried by an informal tribunal convened for the purpose by the commanding general. As these offences derive their criminal character from the existence of war, and only retain it during its continuance, it follows that they lose that quality at the close of the war, when they cease to be punishable. It sometimes happens, however, that, in addition to being offences under the law of nations, they are also offences against the criminal law of the place in which they are committed, in which case they are still triable, notwithstanding the peace, by military courts or by the ordinary civil tribunals. For a similar reason all prisoners held by a belligerent, for violations of the laws of war, are entitled to be set at liberty at the date when the treaty of peace becomes operative. If, however, they are undergoing sentences, imposed by lawful military tribunals, their status is not affected by the termination of hostilities.[1]

[1] II Halleck, pp. 452–454; Instructions for Armies of the United States, etc., paragraphs 4, 5, 12, 13, 44, 47; Hall, pp. 413, 414. In the military service of the United States such tribunals are known as military commissions. This tribunal was first resorted to by General Scott, during the war with Mexico, for the trial of persons not subject to the Articles of War and for the trial of military persons for offences not triable by general courts-martial. The tribunal before which Major André was tried, at West Point in 1780, although described as a court-martial in the order creating it, was, in fact, a military commission, as the Articles of War then in force did not confer jurisdiction upon courts-martial for the trial of the offence charged in Major André's case—that of being a spy. See also IV Calvo, §§ 2184–2192; VII Pradier-Fodéré, §§ 2973–2988; III Dig. Int. Law, §§ 354, 355;

Military Jurisdiction. The trial of persons charged with crimes committed in violation of the law of war, or for offences created by the municipal law of a belligerent, constitute an exercise of military jurisdiction; that is, of the power to try criminal cases, to determine questions of guilt or innocence, and to impose adequate sentences.

Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the laws or usages of war. Military offences under the statute law must be tried in the manner therein directed; but military offences which do not come within the statute are tried and punished under the common law of war. The character of the courts which exercise these several forms of jurisdiction depends upon the local laws of each particular country.[1]

In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the "Rules and Articles of War," or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.[2]

If, therefore, an offence against the law of a belligerent state be committed by a person belonging to its military establishment, or otherwise subject to its military jurisdiction, such offender is tried by the appropriate military tribunal of the offended state; if, on the other hand, the offence is not made criminal by the law of that state, or if the offender is not subject to its military law, or if both offender and offence are without its military jurisdiction, the case is usually referred by the commanding general to an informal tribunal for investigation; if the guilt of the offender is established to the satisfaction of such tribunal, an appropriate punishment is recommended and, if approved, is carried into

Dana's Wheaton, §§ 345, 346, notes 167–169.

[1] II Halleck, pp. 452–455; II Guelle, pp. 20–37; VII Pradier-Fodéré, §§ 2976–2988; IV Calvo, §§ 2166, 2167, 2186–2198.

[2] Instructions for the Government of the Armies of the U. S. etc. par. 13. See Appendix A; II Halleck, p. 120; II Winthrop, Military Law, pp. 18–47, 57–94.

effect by the general commanding-in-chief in the occupied territory.[1]

Spies. A spy is a person who enters the lines of an army in disguise, or under false pretences, for the purpose of securing information. An individual who, in the proper uniform of his army, penetrates within an enemy's lines, is not a spy, for it is the duty of the enemy to maintain his line of outposts at such strength and efficiency, in point of numbers, as will make it impossible for individuals to pass them. Concealment or disguise, and the employment of false pretences, are essential elements to the crime of being a spy.[2] Those who undertake to gain information of the enemy's movements by means of balloons cannot be regarded as spies, for none of the essential conditions of the offence attend such operations. Spies are employed at rates of pay commensurate to the risks they undertake, and are presumed to be aware of the penalty incurred in the event of their being captured by the enemy. Service as a spy is voluntary, and cannot be compelled. A state cannot require an individual in its military service to act as a spy. If it permits or authorizes a person in its military or naval service to act in that capacity, the fact of his being in such service will not screen him from punishment, should he be apprehended by the enemy; nor will retaliation be justifiable on the part of the belligerent who so employs persons in his military service.

For being a spy the punishment is death. An individual charged with the crime cannot demand a trial; it is granted, if at all, by the municipal law of the captor's state;[3] or in

[1] Davis, Mil. Law, pp. 5, 42–60, 300–313; II Winthrop, Mil. Law, pp. 18–47, 57–94; III Dig. Int. Law, § 354; VII Pradier-Fodéré, §§ 2974–2989.

[2] II Halleck, pp. 30–35; Hall, pp. 537–539; II Ferguson, § 192; Risley, pp. 121–124; Heffter, § 250; Klüber, §§ 266–266c; Vattel, liv. iii. chap. x. §§ 179–182; Grotius, liv. iii. chap. iv. § 18; Snow, p. 96; Bluntschli, §§ 628–631; III Phillimore, § 96; Field, Int. Code, § 802; I Guelle, pp. 122–126; IV Calvo, §§ 2111–2114; VI Pradier-Fodéré, §§ 2765–2768; Articles 30 and 31 Convention of The Hague, 1899.

[3] II Halleck, p. 30; Woolsey, § 141; Snow, p. 96; § 1343 Revised Statutes (U. S.); Hall, pp. 537, 538; III Phillimore, § 96; Art. 21 Brussels Conference. After the retreat

consequence of treaty stipulations between the opposing belligerents.[1]

Guerillas. These are persons who lurk in the vicinity of an army, and commit acts of hostility without the authorization of their government, or who carry on their operations in violation of the laws of war. Guerillas are not to be confounded with bands or organized parties, commissioned by their government and forming a part of its regular forces, called *partisans*, whose operations, however annoying to an enemy, are perfectly lawful so long as they are carried on in accordance with the laws of war. Guerillas, however, are not partisans, "their acts are unlawful, and when captured they are not treated as prisoners of war, but as criminals, subject to the punishment due to their crimes. . . . The perpetrators of such

of Washington from Long Island, Captain Nathan Hale, an officer of the Revolutionary army, recrossed to that island and entered the British lines with the express purpose of obtaining information as to the strength, movements, and purposes of the enemy. In 1780 Major André became the agent in effecting the bribery of Arnold with a view to induce that officer to betray the post committed to his charge. On his return to New York, and while within the American lines, André was captured by the outposts of the enemy. In both cases the officers were captured within the lines of the enemy in disguise, with intent to obtain information as to his strength and purposes; both were condemned to death and executed for the same violation of the laws of war. These cases illustrate the rule that, while an officer or enlisted man may not be compelled to act as a spy, the service of either in that capacity is by no means dishonorable. The severe punishment imposed is justified by the danger to which belligerents are exposed by the operations of spies and secret agents; the service itself, though, as we have seen, not one upon which a military person may properly be detailed, is honorable when undertaken by a soldier for patriotic motives, as was especially the case with Captain Hale; it ceases to be honorable only when it is undertaken for purely mercenary motives.—II Halleck, pp. 32, 33.

[1] Article 30 of the Rules of War on Land, adopted by the Peace Conference at The Hague, in 1899, contains the requirement that, in wars to which the signatory powers are the belligerent parties, persons charged with acts of espionage shall be tried by the appropriate military tribunals of the captor state before undergoing the infliction of the punishment authorized by the laws of war. Article 31 of the same convention, provides that spies who are captured, after having successfully returned to the lines of the army which employs them, shall not be liable to trial or punishment for offences committed prior to such successful return.

acts, under such circumstances, are not enemies, legitimately in arms, who can plead the laws of war in their justification, they are robbers and murderers, and, as such, may be punished."[1]

Pillaging consists in the forcible taking of property in an enemy's country, without authority, or in disobedience of orders. It has been seen that the laws of war prescribe a method in strict accordance with which certain kinds of property may be taken in war. If it be taken in any other way such taking constitutes pillage, and is punishable accordingly. There can be no higher test of discipline in a command than is shown by the manner in which the private property of an enemy is treated within its sphere of operations. If such property is respected, if acts of pillage are strictly repressed and severely punished, the discipline is good. If property and life are unsafe in its vicinity, if irregular seizures are permitted, if orchards and fields are devastated, discipline worthy of the name cannot be said to exist.[2]

The punishment of pillage varies with the nature of the offence. The extreme penalty is death.

Crimes of Violence. Certain crimes of violence, such as murder, robbery, mayhem, rape, burglary, assault and battery, and assaults with intent to commit crime, when committed by, or against, residents or individuals of the invading army, are punishable by military commissions, or other tribunals of like jurisdiction. The punishment inflicted is usually more severe than that awarded by the law of the place where the offence is committed. This course is made necessary by the fact that, in the immediate theatre of war, all civil authority is suspended, the local courts being prevented, by the fact of war, from exercising their ordinary functions. If such crimes

[1] II Halleck, p. 7. General Halleck includes *guerillas* and *partisans* under the same designation. In this matter it is rather the service in which these persons are engaged, than their name, by which their status is regulated.

[2] Hall, pp. 423, 424; Boyd's Wheaton, § 346a; Klüber, § 263; Snow, pp. 99, 100; Article 31 Brussels Conference; Woolsey, § 138; II Halleck, pp. 113, 114; IV Calvo, §§ 2223-2225; Guelle, pp. 158-164; Bluntschli, §§ 661-663; Articles 23 and 28 Convention of The Hague, 1899.

were not punished by the belligerent they would go unpunished, a most undesirable event from every point of view. Crimes, at such a time, are of more frequent occurrence, and are usually of greater enormity, than during a state of peace. The ordinary restraints of law are removed or suspended, and the criminal class soon asserts itself as it finds that opportunity, temptation, and apparent immunity go hand in hand.[1] The very presence of a hostile force upon the soil of a country seems to breed a special criminal class. This class is recruited by deserters from both armies, who, operating singly or in small bands, commit depredations of all kinds, accompanying their criminal acts with the most barbarous atrocities.[2] It is to the suppression of this kind of brigandage that every belligerent finds himself obliged to devote considerable time and attention, and, not infrequently, a large amount of military force. No repressive measures are too severe which effect any reduction in this kind of crime. The criminals themselves are outlaws, beyond the protection of all law, civil or martial, and may be hunted down like wild beasts.[3]

Collective Responsibility of Communities for Acts of Individuals. Where offences against the laws of war are committed by residents of a particular locality, under such circumstances as to render the detection of the individual offenders difficult or impossible, the town, district, or other organized community, in which the offences are being committed, may be held collectively responsible for their commission; in this way making the community responsible for the misdeeds of its individual members. To justify a resort to

[1] Instances have occurred in which prisons and jails have been emptied upon the approach of an invading army.

[2] Hall, pp. 413–416; III Phill. p. 156; Instructions for the Armies of the U. S. par. 44. Such offences, when committed in the theatre of operations of an army of the United States, in time of war, are, by the terms of the 58th Article of War, made triable by a general court-martial, subject, however, to the requirement that "the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the state, territory, or district in which such offence may have been committed." — 58th Article of War, § 1342 Revised Statutes of the United States.

[3] Paragraphs 44, 84, American Instructions; Bluntschli, §§ 641–643; II Halleck, pp. 113, 114.

this procedure, however, the local authorities must be in a position to act, by way of prevention, and the unlawful acts alleged to have been committed must be within the power of such authority to control, by an exercise of reasonable diligence, in respect to the measures of prevention resorted to with a view to the prevention or repression of the conduct complained of.[1] The methods resorted to in dealing with such a community will depend upon the circumstances of the particular case. Privileges may be withheld, individual rights may be suspended, or denied, trade may be curtailed, or subjected to unusual impositions, punitive damages may be assessed and collected, or hostages may be taken as security for the good behavior of the inhabitants of the disturbed district.

Retaliation. In the cases already described, the offence has been committed by an individual, or by a number of individuals, acting singly, or as conspirators, or joint offenders; and the observance of the laws of war is secured by the punishment of the particular offenders by the reference of their cases to an appropriate military tribunal. It happens not infrequently, however, that the real offender is, not the individual, but the government of the belligerent state, or the commanding general of its armies in a particular theatre of military operations; and the offence consists in the violation of a particular rule of war by the troops under such general's command, or in a failure on his part to conduct certain military operations in accordance with the rules of war as understood and applied by the general usage of nations. In such cases, as it is obviously impossible to apprehend, try, and punish either the offending government, or its military commander in the field, they are effectively coerced into obedience to the rules of war by an application of a principle, presently to be described, called *retaliation*.

As the laws of war are equally obligatory upon the belligerent states and their allies, and upon the generals who control

[1] Hall, pp. 413-415; II Halleck, p. 109; Dana's Wheaton, §§ 347-349; VII Pradier-Fodéré, §§ 2982-2989; Bluntschli, § 643 bis; Lawrence, Int. Law, pp. 377, 378; III F. De Martens, § 119.

and direct their military operations in the field, it follows that the duty of observing those laws is reciprocal, and bears equally upon both belligerents. If either of them violates a rule of war, or fails to conduct his operations in strict accordance with the accepted usages of civilized warfare, he cannot complain of similar conduct on the part of his enemy; on the contrary, he must expect it. The power of compelling an enemy to observe the rules of war, or to refrain from violating any particular one of them, is called the *right of retaliation.*[1] A general who suffers a wrong at the hands of an enemy, or who finds that his enemy has violated any of the accepted usages of war, addresses him a communication setting forth the facts which constitute his ground of complaint. If no explanation or apology is attempted, or if the enemy assumes the responsibility of the act, he is justified in resorting to measures of retaliation. In choosing a means of retaliation, revenge cannot enter into the consideration or decision of the question. His sole purpose must be to constrain his adversary to discontinue the irregular acts complained of. Unless the enemy's act be in gross violation of the dictates of humanity, he must retaliate by resorting to the same or similar acts in his military operations.[2] *States* which find themselves compelled in time of peace to resort to retorsion, as a means of obtaining justice, are permitted to make use of *equivalent* wrongs. *Generals* who are obliged to have recourse to retaliatory measures, however, must confine themselves to the *same or similar* acts. This because of the difficulty of balancing wrongs, and because the enemy, not appreciating the justice of the remedy adopted, may feel himself justified in still further departing from the accepted usages, and may ultimately decline to be bound by any of the rules of civilized warfare.[3]

[1] Hall, § 135; Boyd's Wheaton, § 347; Snow, p. 97; Woolsey, § 132; II Ferguson, § 196; Risley, p. 126; Creasy, p. 401; III Phillimore, p. 156; Bluntschli, § 567; Walker, Science of Int. Law, p. 349; Vattel, liv. iii. chap. viii. § 141; liv. iv. chap. vii. § 102.

[2] Woolsey, § 132; Risley, p. 126; Field, International Code, §§ 758, 759.

[3] The law of war can no more

MILITARY OCCUPATION

Temporary Occupation. When an invading force has taken secure possession of a portion of the territory of the enemy, such territory is said to be occupied, and the invader is permitted to exercise there all the rights of military occupation. The former sovereign has been displaced by an application of military force, but the allegiance of the inhabitants to their former government, although displaced, or suspended, by the existence of war and the fact of hostile occupation, has not been destroyed. Their obedience to the authority of the invader is constrained and involuntary, and can be retained by him only so long as the occupying force is maintained at such strength, throughout the extent of the occupied territory, as to effectively compel such obedience.[1]

History of the Different Views of Occupation. The theory of the Roman law, upon the subject of occupation, was that territory, or other property, lost by the state or by a Roman citizen, as a result of war, became the property of a captor who was sufficiently powerful to occupy and retain it; it also provided that, during such transient occupancy, all the rights of sovereignty and ownership were vested, for the time, in the owner or captor. The allegiance of the inhabitants to their former sovereign was legally dissolved and was, by the

wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.—Par. 27 Inst. for Armies of the U. S. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution. Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of a regular war, and by rapid steps leads them nearer to the internecine wars of savages. —Par. 28 Ibid.

[1] Boyd's Wheaton, § 346c; U. S. *vs.* Percheman, 7 Peters, 86, 87; Leitendorfer *vs.* Webb, 20 Howard, 176; U. S. *vs.* Moreno, 1 Wallace, 400; II Halleck, pp. 462–465; Risley, pp. 135–139; Hall, pp. 462, 463; Creasy, pp. 496, 497.

very fact of such hostile occupation, transferred to the new sovereign. This view was maintained, in practice, until after the middle of the eighteenth century.[1]

Towards the close of the last century, however, and as a consequence of the frequent cases of occupation during the wars that followed the French Revolution, a different view began to prevail. The doctrine of a complete transfer of allegiance and sovereignty was generally abandoned, and was replaced by a theory of temporary substitution of sovereignty, involving a temporary transfer of allegiance on the part of the inhabitants of the occupied territory. This view may be stated as follows: "The power to protect is the foundation of the duty of allegiance; when, therefore, a state ceases to be able to protect a portion of its subjects, it loses its claim upon their allegiance, and they either directly pass under a temporary or qualified allegiance to the conqueror, or, as it is also put, being able, in their state of freedom, to enter into a compact with the invader, they tacitly agree to acknowledge his sovereignty in consideration of the relinquishment by him of the extreme rights of war which he holds over their lives and property."[2]

Difference of Opinion as to the Meaning of the Term Occupation. The precise meaning of the term *occupation* has given rise to much difference of opinion. A definition was adopted by The Hague Conference, in 1899; in accordance with which territory is regarded as occupied "when it finds itself placed in fact under the authority of the hostile army. The occupation only extends to those territories where this authority is established and in a position to be exercised."[3] As the conclusions of the Peace Conference were expressed in the form of a treaty, it follows that the principle above set

[1] Grotius, liv. iii. chap. viii. § 4; Albericus Gentilis, De Jure Belli, liv. iii. chap. v.; Hall, pp. 462, 463; De Martens, Précis, § 280; Heffter, § 132; Creasy, pp. 496–502; Lawrence, Int. Law, § 200.

[2] Hall, p. 467; Klüber, § 256; De Martens, Précis, § 280; Shanks *vs.* Dupont, 3 Peters, 246; II Halleck, pp. 462–464; IV Calvo, § 2166.

[3] Article 1 Hague Conference; Creasy, pp. 496–504; Lawrence, Int. Law, §§ 200, 201; IV Calvo. §§ 2166–2192.

forth now constitutes the rule of international law on this subject, in so far as the signatory parties to that instrument are concerned.

Opposing Views. Two views have been advanced as to what constitutes military occupation. One, maintained by England and the smaller European states, regards a portion of territory as occupied only when it is held by a force sufficient to maintain, at all points, the authority of the invader, and to suppress uprisings against such authority. The Swiss delegate to the Brussels Conference properly compared this view of military occupation to a valid blockade; both, to be binding, must be maintained in sufficient force to be effective. The other, and opposite view, is supported by some of the more powerful Continental states; they regard occupation as complete when the principal armies of the enemy have been defeated and the authority of the legitimate government has been displaced or overthrown. Obedience then becomes the *duty* of the population, independently of the force by which such authority is maintained. Risings against the authority of an invader are by them viewed as illegal; subjecting persons, districts, and towns who favor them, or who take part in them, to severe punishments.

The operation of this rule would work to the advantage of states which maintain large standing armies, and would greatly facilitate aggressive warfare. It would operate with greatest force against states which maintain small permanent establishments, whose policy is rather defensive than offensive, and who are obliged to rely, in time of war, upon the united resistance of their entire combatant population.

Of the two views which have been described, there can be no question that the former is more nearly in accordance with the present rule of international law. Occupation is an act of force, the authority of the invader is maintained by force, the obedience of the population is compelled by force, and obedience exists only so long as the constraint continues. The right of revolution is now recognized to exist, even against the regular government of a state, which rests upon the pre-

sumed consent of the governed. Still more does the right of armed resistance exist against an authority, which not only has no basis in the consent of the governed, but which is enforced and maintained, against such consent, by superior military force.

Present View of Occupation. A portion of the territory of the enemy is therefore said to be occupied when the authority of the former government has been overthrown within its boundaries, and it is held by a sufficient military force to prevent uprising, to protect life and property, and secure the prevalence of order throughout the occupied district. Occupation is thus seen to be a question of fact and can never be presumed; if a territory frees itself from the exercise of this authority, it ceases to be regarded as occupied.[1]

In accordance with the present view of occupation, therefore, no permanent change ensues in the national character, or allegiance, of the population of an occupied territory as a result of the mere fact of occupation. The invader maintains himself in such territory by force. The relation existing, between the commanding general of the occupying force and the population, is not that of allegiance, but of constrained obedience; and it exists only so long as he is able to compel such obedience by force. The authority exercised by an invader is something entirely different from that exercised by the legitimate government, and rests upon an entirely different basis. In most respects it is greater and more extensive than the latter, and has no foundation in the consent of the governed.

The legitimate government of the occupied territory is temporarily displaced and overthrown; the functions of its officers and agents are suspended, and the territory is ruled by martial law. The ordinary civil laws of the country continue to exist, and the courts are permitted to administer them, but they do so at the pleasure of the commanding general of the occupy-

[1] I Ferguson, pp. 296, 297; Articles 42–56 Hague Conference; Walker, Manual, pp. 143–145; Hall, pp. 469, 470; Creasy, pp. 502–505.

ing forces. No guarantees, constitutional or otherwise, are effective against his will, and his consent to their existence, or execution, may be withdrawn at any time. The occupation is *military*, not *civil*, and the invader, in carrying on his government, is controlled by various considerations, among which, from the necessities of the case, those of a military character are likely to prevail.[1]

Rights of Occupation. The movable property of the displaced government vests in the belligerent invader by right of capture. He may make such use of the state property and lands as he sees fit, and the income from such property is payable to him during the period of his occupation. Taxes due, and payable, are collected by his authority, and are expended under his direction. If he increases them, or imposes any other burdens or exactions upon persons or property, he does so by virtue of his right to levy contributions and requisitions.[2]

[1] Boyd's Wheaton, § 346c; U. S. *vs.* Rice, 4 Wheaton, 246; Fleming *vs.* Page, 9 Howard, 603, 614; II Halleck, pp. 449–453; Lawrence, Int. Law, §§ 201, 203; IV Calvo, §§ 2166–2194; II Guelle, pp. 11–173; I Dig. Int. Law, § 3.

[2] The conquering power has a right to displace the pre-existing authority and to assume, to such extent as it may deem proper, the exercise by itself of all powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. —New Orleans *vs.* Steamship Company, 20 Wallace, 387 [394]. An island conquered and occupied by the enemy is, for belligerent and commercial purposes, his soil. The produce of that soil is liable to condemnation while it belongs to the individual proprietor of the soil which produced it, although he is a neutral. — Thirty Hogsheads of Sugar *vs.* Boyle, 9 Cranch, 191. By the conquest and military occupation of a portion of the territory of the United States by a public enemy, that portion is to be deemed a foreign country, so far as respects our revenue laws. — United States *vs.* Rice, 4 Wheaton, 246. By the conquest and occupation of Castine, that territory passed under the temporary allegiance and sovereignty of the enemy. The sovereignty of the United States over the territory was suspended during such occupation, so that the laws of the United States could not be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. —

The purpose of war is to obtain redress for an international wrong. To accomplish this purpose the use of force which is excessive, or which does not directly contribute to the end in view, is not lawful. An invader, therefore, is not justified, during his temporary occupancy, in making political or constitutional changes in the government of the occupied territory.[1]

The Hague Conference of 1899, in its rules of war on land, places a restriction upon the power of a military occupant, in this regard, by the requirement that "the occupying state shall regard itself only as the administrator of the occupied territory, and as in enjoyment of the usufruct of the public buildings, landed estates, forests, and agricultural interests belonging to the state. It shall be its duty to protect the capital of these properties and to administer them in accordance with the principles of usufruct."[2]

The civil courts of the country should be kept open, and, wherever practicable, the subordinate officers of the administration should be continued in their functions; supported and sustained, if need be, by the military force of the invader. The responsibility of maintaining public order, and of punishing crime, falls directly upon the commanding general of the occupying force. In the performance of this duty he may make use of the local criminal courts, wholly or in part; or he may resort to martial law.[3]

United States *vs.* Hayward, 2 Gallison, 485 [501]; Bluntschli, §§ 531–548.

[1] II Halleck, pp. 449–453; Boyd's Wheaton, § 346c; Snow, pp. 109–113; Hall, pp. 469, 470; Woolsey, § 153; IV Calvo, §§ 2166, 2167.

[2] Article 55 Rules of War on Land, Appendix E.

[3] California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterward, the United States had military possession of all of Upper California. Early in 1847, the President, as constitutional commander-in-chief of the Army and Navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government and of the army which had the conquest in possession. . . . No one can doubt that these orders of the President, and the action of our army and navy commander in conformity with them, were according to the law of arms and the right of conquest, or that they were op-

Martial Law. *Martial law*, or, to speak more correctly, *military rule*, or the *law of hostile occupation*, is a term applied to the government of an occupied territory by the commanding general of the invading force. Martial law also prevails in the immediate theatre of operations of an army in the field.[1] The reason in both cases is the same. The ordinary agencies of government, including the machinery provided for the prevention and punishment of crime, are suspended by the fact of war. This suspension takes place at a time when society is violently disturbed, when the usual restraints of law are at a minimum of efficiency, and when the need of such restraints is the greatest possible. This state of affairs is the direct result of the invasion, or occupation, of the disturbed territory by an enemy. The only organized power capable of restoring and maintaining order is that of the invading force, which is vested in its commanding general. Upon him, therefore, international law places the responsibility of preserving order, punishing crime, and protecting life and property within the limits of his command. His power in the premises is equal to his responsibility. In cases of extreme urgency, such as arise after a great battle, or the capture of a besieged place or a defended town, he may suspend all law, and may punish crimes summarily, or by tribunals of his own constitution.[2]

erative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations. In this instance it is recognized by the treaty itself.—Cross *vs.* Harrison, 16 Howard, 190. The Constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent states. The establishment of such courts was the exercise of the ordinary rights of conquest. — Mechanics and Traders' Bank *vs.* Union Bank, 22 Wallace, 276.

[1] Creasy, pp. 505–507; Finlason, p. 107; Pomeroy, Const. Law, pp. 475–480; I Kent, p. 178, note; I Cooley's Blackstone, p. 413, note; Luther *vs.* Borden, 7 Howard, 1, 45; *Ex parte* Milligan, 4 Wallace, 2.

[2] Hall, pp. 469, 470; II Ferguson, §§ 187, 269; Risley, pp. 135–139; Snow, pp. 109–113; Creasy, pp. 505–507; Instructions to Armies of the United States, etc., pars. 1–13. Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary, but it must be obeyed. — United States *vs.* Diekelman, 92 U. S. 526. A merchant vessel of one country visiting, for the purpose of trade, a port of another

If his occupation be temporary, amounting to a mere passage through a portion of the enemy's territory, he may decline to interfere in local affairs, further than to make such transient dispositions as will protect non-combatants and their property along his line of march. If he occupies a district for a considerable period of time his responsibility becomes more general, and the performance of his duty more intricate and difficult. To deduce a rule that shall control a general commanding in an enemy's country, his position and duty must be clearly understood. He appears in the occupied territory as an agent of his government, charged with conduct of certain military operations. His first responsibility is to his own government, for the successful conduct of the military operations with the direction of which he is charged. In carrying on those operations his government and himself are bound by the laws of war. The usages of war authorize him to employ certain forcible measures towards his enemy. They forbid indiscriminate violence, the use of excessive force, or the use of any force which does not contribute directly to the end for which the war is undertaken. His exercise of authority in the occupied territory must, therefore, be the least possible, consistent with these ends. He may suspend the constitution and municipal laws, but he cannot change them, because such changes in no way contribute to the prosecution of the war. He can impose no unusual or unauthorized burdens upon persons and property, because the laws of war require him to protect them.[1]

If the territory is to be occupied for a considerable time, but without the intention, on the part of the invader, of permanently incorporating it in his own dominions, it is usual to permit the local laws to prevail, and to sanction their enforcement by the existing courts and other legal agencies. Crimes of special atrocity, offences against the laws of war, and crimes

where martial law has been established, under belligerent right, subjects herself to that law while she is in such port.—Ibid.

[1] Hall, pp. 469–478; II Halleck, pp. 446–477; Risley, pp. 134–140; Creasy, pp. 504–510.

over which neither the local nor military courts have jurisdiction, are tried and punished by military commissions, or other special tribunals, constituted for the purpose by the commanding general. The existence of these tribunals is recognized by the laws of war as a necessity of martial rule.[1]

Indefinite Occupation. When territory comes into the temporary possession of a state, as a result of war, and its ultimate disposition is to be subsequently determined, the state into whose temporary possession it passes becomes vested with full rights of sovereignty, in so far as foreign states and its former sovereign are concerned, from the date of the occupation, which is confirmed by the treaty of peace. In respect to the occupied territory, however, the new sovereign occupies, in most respects, the status of a trustee. If his duties are not defined by the treaty of peace they are determined by the circumstances of the case; and he administers the affairs of the territory in the interest of its inhabitants until the question of its ultimate disposition has been lawfully determined. While all governmental authority, legislative and judicial, as well as executive, vests in the new sovereign, such authority must be exercised with constant reference to its transient and temporary character. "He is therefore forbidden, as a general rule, to vary or suspend laws affecting property and private personal relations, or which regulate the moral order of the community. Commonly, also, he has not the right to interfere with the public exercise of religion, or to restrict expression of opinion upon matters not directly touching his rule."[2]

Permanent Occupation. The rules which have been discussed refer to cases of temporary or indefinite occupation.

[1] II Halleck, pp. 452–454.

[2] Hall, § 155; Bluntschli, §§ 539 540; Creasy, p. 507; Proclamation of Count Bismarck-Bohlen to inhabitants of Alsace, August 30, 1871, D'Angeberg, No. 371; Dana's Wheaton, § 347, note 169; Risley, p. 137; II Halleck, pp. 450–451; I Wildman, pp. 162–164. The capture and occupation of Tampico by the arms of the United States during the war with Mexico, though sufficient to cause it to be regarded by other nations as part of our territory, did not make it a part of the United States under our Constitution and laws. — Fleming *vs.* Page, 9 Howard, 603.

When a conquest is to be made permanent, as when territory is acquired by conquest, or a province is recovered by the state to which it originally belonged, a belligerent is justified in making such permanent political changes as he may deem expedient or necessary.

In so far as the property rights of individuals are concerned, however, "it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed."[1]

THE INTERCOURSE OF BELLIGERENTS IN WAR

Necessity and Sanction. Although the rule of non-intercourse between belligerent states prevails with great strictness during the existence of war between them, it would be impossible even for hostilities to be carried on, if all intercourse, irrespective of its character and purpose, were to be absolutely prohibited. International law recognizes this necessity, and deduces from the usages of nations in war the rules governing such intercourse, the conditions upon which it is based, and the formalities with which it shall begin and end. Such intercourse, to be lawful, must have some direct connection with the existing state of war, or must be carried on with a view to the re-establishment of friendly relations.

[1] U. S. *vs.* Percheman, 7 Peters, 51, 86; III Phillimore, §§ 539–544, 579–596; I Dig. Int. Law, §§ 3–5; II Ibid. § 187; III Ibid. § 354; IV Calvo, §§ 2453–2490; Bluntschli, §§ 289, 576, 715, 733; II Guelle, pp. 251–258; II Ferguson, § 309; Lawrence, Int. Law, § 239; United States *vs.* Repentigny, 5 Wallace, 211; Strother *vs.* Lucas, 12 Peters, 410; Mitchell *vs.* United States, 9 Ibid. 711; More *vs.* Steinbach, 127 U. S. 70; Leitensdorfer *vs.* Webb, 20 Howard, 176; United States *vs.* Huckabee, 16 Wallace, 414; vol. iii. Revue de Droit International, pp. 531–539; iv. Ibid. 622; v. Ibid. 69–121, 252–254, 531–539.

Flags of Truce. Communication between belligerents in the field is established by means of flags of truce. They are sent towards the enemy's lines habitually during an interval of active operations. In case of extreme urgency they may be sent during an engagement. Though each party has a right to send them, there is no corresponding obligation on the part of the enemy to receive them, though it is usual to do so save in very exceptional cases. After due notification has been given they may be warned away; and, after a reasonable time has been given to allow them to withdraw, they may be fired upon. An officer coming under a flag of truce has no *right* to enter the enemy's lines, nor can he demand that he be conducted into the presence of the commanding general. As a matter of strict right he cannot expect to pass the outposts of the hostile army. His message, if written, may there be transferred to the officer receiving him, or, if verbal, the belligerent may demand that it be reduced to writing, or that it be delivered orally to such person as the commanding general may designate to receive it.

If permitted to pass the outposts he may be blindfolded, or resort may be had to such other means as will prevent him from obtaining information. While the officer accompanying a flag may see whatever the enemy permits him to see, while in that enemy's lines under a flag of truce, and the bearer of a *bona fide* message, the rules of war justly forbid the sending of flags of truce with a view of obtaining information, either directly or indirectly. The present rule of war regards the use of flags for the purpose of obtaining information as illegal and dishonorable, subjecting the bearer to punishment as a spy.[1]

Safe-conducts and Safeguards. A *safe-conduct* is a pass given to an enemy subject by the general commanding an army in the field. It authorizes the bearer to pass from one specified point to another, by a specified route, and within

[1] II Halleck, p. 342; Risley, pp. 96, 97; Boyd's Wheaton, § 411l; 152, 155; Hall, p. 540; Snow, pp. III Phillimore, p. 184.

certain stated limits of time. If the authority granted be exceeded, the holder is liable to be regarded as a prisoner of war. If undue advantage be taken of a safe-conduct, to obtain information, the offender violates the laws of war, and may be punished accordingly.[1] A *safeguard* is a written protection to persons, or property, or both, such persons being resident, or property situated, within the lines of the general issuing it. It is given upon the authority, and by, or in the name of, the general-in-chief, and is binding upon all persons under his command. "Sometimes they are delivered to the parties whose persons or property are to be protected; at others they are posted upon the property itself, as upon a church, museum, library, public office, or private dwelling. They are particularly useful in the assault of a place, or after its capture, or after the termination of a battle, to protect the persons or property of friends from destruction by an excited soldiery."[2]

Violations of either safe-conducts or safeguards are punished with the greatest severity.

It is seen that safe-conducts and safeguards are binding upon the troops commanded by the general who issues or signs them. Whoever violates them, therefore, not only violates the laws of war, but is also guilty of the most serious of all military offences—disobedience of orders. For this reason escorts are usually furnished to enforce respect to these instruments, and severe penalties are imposed upon those who violate them. Such escorts or guards are justified in resorting to the severest measures to punish any violation of their trust.

Licenses to Trade. Licenses to trade are written instruments authorizing their holders to engage in certain trade with the enemy. The rules in accordance with which the trade is to be conducted, the articles to be bought, sold, or exchanged, the amount of trade authorized, the vehicles,

[1] II Halleck, pp. 351–353; Risley, pp. 156, 157; Vattel, liv. iii. chap. xvii. §§ 265–277; Hall, pp. 553–556; Woolsey, § 265; I Guelle, p. 231.

[2] II Halleck, p. 353; Risley, pp. 158, 159; Hall, p. 553; Woolsey, § 155; Vattel, liv. iii. chap. iv. § 171; I Guelle, p. 233.

whether ships or wagons, etc., in which it is to be carried on, are all specifically laid down in the permit. A breach of any of its conditions involves the forfeiture of the goods, conveyances, and other implements engaged, as it constitutes an offence similar to breach of blockade.

Licenses are issued by a belligerent government, or by a general in the field, with the sanction of his government. Trade carried on under them becomes legal, and is so regarded by courts of the state by whom the license is granted.[1]

Cartels and Capitulations. A *cartel* is an agreement entered into between the commanding generals of opposing armies, or fleets, for the purpose of effecting an exchange of prisoners. *Capitulations* are compacts entered into, between the same parties, to regulate the details of surrender of a fortified place, a vessel of war, or a defeated army in the field. They are drawn up in the same manner as treaties, though not with the same formalities, and are interpreted in accordance with the same rules. The general commanding an army in the field is presumed to have authority to make them, and to give effect to their provisions. If he lacks such authority, or if his powers in this respect be limited, it is his duty to so notify his enemy.[2]

THE TERMINATION OF WAR

Truce and Peace. A *truce*, or *suspension of arms*, is a discontinuance of hostile operations over the whole, or a part, of the theatre of military operations. They are classified according to their purpose and duration, and according to the authority of the officers who may make them, into special and general truces. A *special truce* may be entered into by officers, of any grade, who command armies or separate detachments. They are always of a temporary character, and are made for the pur-

[1] II Halleck, pp. 154–160, 364–379; Risley, pp. 158, 159; Woolsey, § 155; Hall, pp. 553–556; Snow, pp. 101, 102; Boyd's Wheaton, §§ 341, 409–410a; Calvo, §§ 1969–1996.

[2] Vattel, liv. iii. chap. xvi. §§ 261–264; Snow, p. 98; Hall, pp. 411, 548; Woolsey, § 154; Risley, p. 157; II Twiss, pp. 353–355; Boyd's Wheaton, §§ 253, 254, 405, 411m; III Phillimore, pp. 181–183; II Halleck, pp. 348, 349, 483.

pose of arranging the details of surrender of a defeated army or besieged place; for burying the dead or removing the wounded after a battle or assault; or for conveying a message to the enemy, and receiving his reply, in some matter of necessary intercourse. These truces may be verbal or written. In general the agreement consists in the letter of one general proposing a truce for a certain purpose, and in the reply of his adversary accepting the proposed arrangement. The duration of the truce, in point of time, is precisely stated in the agreement; and the truce expires, without notice, at the hour fixed for its termination. Special truces are binding upon all persons under the command of the officers who make them.[1]

What may be Done during a Special Truce. During a truce the contracting parties are bound to refrain from all acts of hostility, and to desist from all military operations of a hostile character, and from all preparatory movements or manœuvres which could not have been performed during the continuance of hostilities, or which would have been performed under the fire of the enemy. This rule of conduct is deduced from the definition of a truce—a *suspension* of hostilities. The end of a truce should find both belligerents in precisely the same situation in which they were when it began. Whatever could have been done without regard to the enemy during hostilities may continue to be done during a truce. The movement of trains over a line of supply, the process of collecting forage and provisions, by requisition, in districts within the secure control of either party, may continue during a truce. It has also been contended that a closely invested place may stipulate for the privilege of receiving an amount of supplies equivalent to that consumed during the truce. In strict justice, perhaps, this claim should be admitted. The fall of such a place, however, is usually only a question of time; the besieger occupies a position of decided advantage, and the parties

[1] Vattel, liv. iii. chap. xvi. §§ 234, 235; II Halleck, pp. 342–349; Boyd's Wheaton, §§ 401–407; III Phillimore, pp. 184–189; Risley, pp. 153–156; Snow, pp. 113, 114; Creasy, §§ 468–472; Hall, §§ 543 546; Woolsey, § 156.

enter the truce upon very unequal terms. The besieger, therefore, may properly decline to yield the advantage which he has fairly earned, by permitting provisions to be introduced into the besieged place. To avoid difficulty and misunderstanding, it is always desirable to specify, in the agreement, what particular acts may or may not be done during its continuance.[1]

A General Truce or Armistice is an entire suspension of arms over the whole theatre of military operations. It is made by the belligerent governments, or, with their authority, by the generals commanding in the field, and includes within its scope all operations and forces of whatever character. It is usually entered into when the issue of the war has been settled decisively in favor of one of the belligerents, and with a view to negotiations for peace. This agreement is made with greater formality than is the case with special truces, and describes, in considerable detail, what may and may not be done during the existence of the armistice. It is binding upon all forces, both military and naval, engaged in the war on either side. It goes into effect from the date of signature, and becomes binding upon individuals from the date of notification. In naval operations some time is necessary for such notification to reach vessels of war on distant stations, and special arrangements are made in such cases to regulate the disposition of captures made between the dates of negotiation and ratification.[2]

In the preparation of general truces, or armistices, the possible resumption of hostilities is provided for by a clause terminating the truce at a certain date, or upon the expiration of a certain notice. On the date thus agreed upon the truce ceases to have obligatory force, and hostilities are resumed by both belligerents.

[1] Hall, §§ 543–546; Boyd's Wheaton, §§ 403, 404; III Phillimore, pp. 186–189; II Halleck, pp. 342–349; Risley, pp. 153–156; Snow, pp. 113, 114; Creasy, §§ 470, 471; Woolsey, §§ 156, 157; Vattel, liv. iii. chap. xvi. §§ 241–260; I Guelle, pp. 234–248; IV Calvo, §§ 2433–2449.

[2] Hall, §§ 543, 546–548; Boyd's Wheaton, §§ 400–401; III Phillimore, pp. 183, 184; II Halleck, pp. 342–349; Risley, pp. 152–157; Snow, pp. 113, 114; Creasy, §§ 468–472; Woolsey, §§ 156, 157; Vattel, liv. iii. chap. xvi. §§ 236–244; IV Calvo, §§ 2433–2452.

TREATIES OF PEACE

Treaties of Peace resemble ordinary treaties in form, in the detailed method of preparation, and in binding force. They differ from ordinary treaties, and from private contracts, in respect to the position of the contracting parties, who, from the necessities of the case, do not enter them upon equal terms. This in no respect detracts from their obligatory character, which cannot be too strongly insisted upon. "Agreements entered into by an individual while under duress are void, because it is for the welfare of society that they should be so. If they were binding, the timid would be constantly forced by threats or violence into a surrender of their rights, and even into secrecy as to the oppression under which they were suffering. The [knowledge] that such engagements are void makes the attempt to extort them one of the rarest of human crimes. On the other hand, the welfare of society requires that the engagements entered into by a nation under duress should be binding; for, if they were not so, wars would terminate only by the utter subjugation and ruin of the weaker party."[1]

When either belligerent believes the object of the war to have been attained, or is convinced that it is impossible of attainment; or when the military operations of either power have been so successful as to determine the fortune of war decisively in its favor, a general truce is agreed upon, and negotiations are entered into with a view to the restoration of peace. There is no rule of positive obligation as to the manner in which such negotiations shall be established. The initiative may be taken by either belligerent, either directly with the hostile state, or indirectly through a neutral power. A neutral state may tender its good offices to either belligerent, at any time during the continuance of hostilities. The

[1] Senior, in vol. lxxvii. of the *Edinburgh Review*, p. 307, cited by Creasy, §§ 41, 42. See also I Halleck, pp. 260–266; Vattel, liv. iv. pp. 35–37; Bluntschli, § 395, Heffter, § 179. For an opposite view, see Mommsen, History of Rome, vol. i. p. 403.

purpose of the preliminary negotiations is to arrange for a meeting of duly accredited representatives charged with the preparation of a treaty of peace. In choosing a place of meeting a point may be selected within the territory of either belligerent or in that of a neutral state. If need be, a preliminary agreement is made, guaranteeing the neutrality of the place of meeting and the personal immunity of the ambassadors.

The representatives of the belligerent states meet at the time and place agreed upon, and, after an exchange of full powers, enter upon the task of preparing the treaty of peace. When substantial agreement has been reached as to the general terms of peace, a preliminary draft or treaty is sometimes prepared, containing these provisions, and describing the questions that are to be deferred for final settlement in the permanent treaty. The preliminary treaty is signed and duly ratified by the contracting parties. If the war has been carried on by allies on either side, no one of them is justified, by any reason less strong than self-preservation, in making peace without the consent of the others, or in entering into a treaty prejudicial to the common interest of the allied powers.[1]

Treaties of Peace, when Binding. Treaties of peace become binding upon the signatory powers from the date of signature. They bind individuals from the date of notice. If the war has been carried on in distant dependencies, or on the sea, it is usual to stipulate in the treaty for the restoration of captures made between the dates of signature and notification.[2]

Effects of Treaties of Peace. The cause for which the war was undertaken is presumed to have been settled by the resort to arms, and by the amnesty contained in the treaty. This is the case whether the state which was the aggressor in the war has or has not been successful in its resort to force to

[1] Hall, p. 559, note 1; Vattel, liv. iv. chap. ii. § 9; II Halleck, pp. 251–260; Risley, pp. 160, 161; Boyd's Wheaton, §§ 538–543; III Phillimore, pp. 775–777; Snow, pp. 114, 115.

[2] Hall, § 199; Vattel, liv. iv. chap. iii. § 24; Boyd's Wheaton, § 547; I Halleck, pp. 261–264; III Phillimore, pp. 776–782; Snow, pp. 115, 116.

obtain redress. The subjects of the belligerent states, who were placed in a condition of non-intercourse and of legal hostility, as a result of the declaration of war, are restored to their normal relations. Citizens of the several belligerent states resume friendly intercourse and are revested with the legal relations which were interrupted, but not destroyed, at the outbreak of hostilities. Their right to sue and be sued is revived, obligations which were suspended, by the fact of war, resume their force with the establishment of peace, and the payment of public and private debts, and of interest upon public stocks, is resumed.[1]

Treatment of Occupied Territory. Questions connected with territory, occupied by either belligerent at the close of the war, are usually settled by the terms of the treaty. In doing this some status is assumed, and this may be that existing before the war, or at its close; or an intermediate status may be chosen that existed at some instant during the continuance of hostilities. The details of evacuation of occupied territory, fortresses, and ports are arranged with great precision. Forts, arsenals, dock-yards, and naval ports, the surrender or evacuation of which is arranged for in the treaty, are transferred in the condition in which they were at the date of the treaty. They cannot be dismantled, disarmed, or destroyed; but no obligation exists to repair them after that date, even when such repairs are necessary to prevent injury or deterioration.[2]

The Rule of Uti Possidetis. If the treaty of peace is silent in respect to occupied territory, or contains no provisions in respect to the disposition of particular tracts or areas, the rule of *uti possidetis* determines the sovereignty or ownership of the territory so occupied or held; that is, each belligerent retains the territory of the enemy which was held by him at the date upon which the treaty became operative.[3] The rule

[1] Vattel, liv. iv. chap. iii. § 25; Hall, § 200; Heffter, § 181; Dana's Wheaton, § 544, note 169; I Halleck, p. 260; III Phillimore, §§ 588–590.

[2] Vattel, liv. iv. chap. iii. § 31; I Halleck, p. 265.

[3] Hall, § 204; Dana's Wheaton, § 545; Heffter, § 181; III Phillimore, §§ 588–590.

as to the real property of the enemy is substantially the same as that applied to territory. Immovable property, belonging to either belligerent, shares the fate of the territory in which it is situated, unless otherwise stipulated in the treaty.

Movable property of the enemy in the hands of a belligerent, at the date of the treaty, becomes his by the fact of possession. Contributions levied, but not collected, become void when the treaty goes into effect; and no new contributions or requisitions can be levied by either party, without the express authorization of the treaty. The right to levy them is an incident of belligerency, and ceases at the termination of hostilities.[1]

Effects of Conquest or Cession upon the Property and Rights of Private Individuals. In respect to the private property of individuals, and their contract rights and other legal relations with each other, it is now well settled that they undergo no change as a result of a transfer of territory, either by conquest or treaty.[2] "The usage of the world is, if a nation be not entirely subdued, to consider the holding of a con-

more, §§ 539–579; Klüber, § 257; I Halleck, p. 266; II Ibid. p. 514; Risley, pp. 135–160; *The Purissima Concepcion*, 6 Robinson, Adm. Rep. p. 45.

[1] Vattel, liv. iv. chap. iii. §§ 24–29; V Calvo, § 3142; Hall, § 198; Hefter, § 180; Bluntschli, § 717. "Even in cases of conquest it is very unusual for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated, and private rights annulled, on a change in the sovereignty of the country by the Florida treaty. The people change their allegiance, their relation to their ancient sovereign is dissolved, but their relations to each other and their rights of property remain undisturbed. Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who become subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign." —United States *vs.* Percheman, 7 Peters, 51; United States *vs.* Clarke, 8 Peters, 436; Delassus *vs.* The United States, 9 Peters, 117; Mitchel *vs.* United States, 9 Peters, 711.

[2] Vattel, liv. i. chap. xx. §§ 244, 245; Hall, §§ 198, 199; Dana's Wheaton, § 544, note 169; Hefter, §§ 133–150; I Halleck, p. 260; IV Calvo, § 2478; III Phillimore, §§ 587–595.

quered territory as a mere military occupation until its fate shall be determined by the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms of the treaty of cession or on such as its new master shall impose. On such a transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be deemed political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State." [1]

Allegiance of the Population of the Conquered or Ceded Territory. When territory changes hands, by cession or conquest, the fact that allegiance is now based upon consent is usually recognized by the insertion of a clause in the treaty by which the conquest is completed or the cession accomplished, permitting such of the inhabitants as desire to retain their former citizenship to dispose of their property and

[1] American Insurance Company *vs.* Canter, 1 Peters, 542; United States *vs.* Percheman, 7 Peters, 51, 56. "By the law of nations the rights and property of the inhabitants are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect; and the laws, whether in writing or evidenced by the usage and customs of the conquered or ceded country, continue in force till altered by the new sovereign."—Strother *vs.* Lucas, 12 Peters, 410 [436]. "By the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquired it by cession, and remain under their former laws until they shall be changed."—Mitchel *vs.* United States, 9 Peters, 734. "By the 'laws of Spain' is understood the will of the King, expressed in his orders, or by his authority, evidenced by the acts themselves; or by such usage and customs in the province as may be presumed to have emanated from the King, or to have been sanctioned by him, as existing authorized local laws."—Smith *vs.* The United States, 10 Peters, 326.

return to the state of their original allegiance. Individuals who decline to take advantage of this permission and elect to remain in the ceded territory are presumed to consent to the change in allegiance which is involved in the conquest or cession.[1] From the nature of the case, however, no formal guarantee of the allegiance of the population of territory thus transferred is either given or expected. It is proper to say, also, that while the inhabitants of conquered or ceded territory become vested with the rights of citizenship by the fact of conquest or cession, in so far as other states are concerned, their actual absorption into the body politic of the conquering state is a matter which is regulated, not by international law, but by the constitution and laws of the state to which their allegiance has been transferred by conquest or cession.[2]

[1] IV Calvo, §§ 2466, 2469; Amer. Ins. Co. *vs.* Canter, 1 Peters, 542; Heffter, § 131; II Halleck, pp. 489–497.

[2] III Phillimore, §§ 591–593; Hall, §§ 205, 206; Dana's Wheaton, § 346, note 169; II Halleck, pp. 485–489; United States *vs.* Repentigny, 5 Wallace, 260; I Wildman, p. 162; IV Calvo, §§ 2466–2477. "By a principle of international law, on a transfer of territory by one nation to another, the political relations between the inhabitants of the ceded country and the former government are changed, and new ones arise between them and the new government. The manner in which this is to be effected is ordinarily the subject of treaty. The contracting parties have the right to contract to transfer and receive respectively the allegiance of all the native-born citizens; but the naturalized citizens, who owe allegiance purely statutory, are, when released therefrom, remitted to their original status."—Tobin *vs.* Walkinshaw, 1 McAllister, 186; Amer. Ins. Co. *vs.* Canter, 1 Peters, 542. "When New Mexico was conquered by the United States, it was only the allegiance of the people that was changed; their relation to each other and their rights of property remained undisturbed."—Leitensdorfer *et al. vs.* Webb, 20 Howard, 176. "On a conquest by one nation of another, and the subsequent surrender of the soil and change of sovereignty, those of the former inhabitants who do not remain and become citizens of the victorious sovereign, but, on the contrary, adhere to their old allegiance and continue in the service of the vanquished sovereign, deprive themselves of protection or security to their property, except so far as it may be secured by treaty."—United States *vs.* Repentigny, 5 Wallace, 211. "Hence where, on such a conquest, a treaty provided that the former inhabitants who wished to adhere in allegiance to their vanquished sovereign might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to

Effects of Conquest or Cession upon Municipal Laws. It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country —that is, laws which are intended for the protection of private rights—continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to another, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. . . . But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are of a strictly municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.[1]

The extent and amount of the political changes, and the circumstances under which they shall be accomplished; whether, for example, they shall be violent, and become operative immediately upon the execution of the treaty of peace, or gradual, extending over a considerable period of time, are questions

the conqueror."—Ibid. "Citizens of territory acquired by the United States as a result of conquest or cession have the international privileges of citizenship, in respect to extraterritorial protection, etc., from the date of the treaty of peace or of cession. The matter of their citizenship or naturalization, as a question of municipal law, if not settled in the treaty, depends upon the legislation of Congress. The Treaty of Frankfort, in 1871, authorized liberty of emigration from the provinces of Alsace and Lorraine until October 1, 1872."—XIX Nouv. Rec. Gen. p. 689; Hall, p. 572, note; III Phillimore, pp. 868–871.

[1] Chicago and Pacific Railway Company *vs.* McGlinn, 114 United States, 542; Mitchel *vs.* United States, 9 Peters, 734; Strother *vs.* Lucas, 12 Peters, 410, 436; American Insurance Company *vs.* Canter, 1 Peters, 542; II Halleck, pp. 460, 461, 493; Dana's Wheaton, p. 347, note 169; Hall, §§ 27–29, p. 205; Vattel, liv. i. chap. xxi. §§ 261–265; Risley, pp. 165, 166; United States *vs.* Percheman, 7 Peters, 83; III Phillimore, pp. 862–866; IV Calvo, §§ 2458–2477.

that depend, in part, upon the terms of the treaty or the circumstances of the conquest, and, in part, upon the differences between the legal conceptions and political institutions of the conquering and conquered states. In any case, however, as the laws of a state must, in general, be uniform throughout the entire extent of its territory, it follows that, if marked differences exist between the laws in force in the acquired provinces and those of the new sovereignty, such differences must eventually be removed or made to disappear. Indeed, uniformity of operation can be secured in no other way.

If, however, the necessary changes be extensive and important, as would be the case in which a people whose legal institutions were based upon the Roman law passes under the dominion of a state whose constitutional ideas are derived from the common law, every consideration of expediency and justice would seem to suggest the wisdom and propriety of effecting such changes in a manner so gradual as to cause a minimum of disturbance to existing institutions. A similar difficulty presents itself where territory in which representative institutions are firmly established, and the population of which has been accustomed to a large measure of self-government, passes into the dominion of a state in which individual rights are more rigidly restricted, or where representative institutions do not exist. In this case the assimilation of population becomes considerably more difficult than in the former, where the changes caused by the fact of conquest are all in the direction of liberality and tend to add to, rather than to detract from, the constitutional rights of individuals. It is proper to remember in this connection, however, that an inhabitant who has been afforded an opportunity to dispose of his property and withdraw from the ceded territory, but who elects to remain there, and, by so doing, to acquire residence and citizenship in the conquering state, must be presumed to have signified his willingness to accept such changes in his political status as the new sovereign may see fit to impose.[1]

[1] For the practice of Great Britain in this regard, see I Wildman, pp. 162–164; Hall, § 205; *The Foltina*, 1 Dodson, Adm. Rep. p. 451;

Responsibility of a State for Injury or Damage to Private Property. It has been seen that the destruction of private property, and its taking for belligerent use, are inevitable incidents of war; it has also been seen that the right to take and destroy is exercised by both belligerents, and upon all property, whatever may be its ownership, which is located in the theatre of active military operations. If the property of an individual be appropriated or destroyed by his own government, the question of compensation is, in general, a strictly internal one, with which international law has nothing to do. If, on the other hand, the property of enemies' subjects be taken or destroyed by an invading army, such appropriation or destruction is regulated by the rules and usages of war; this is seen in the requirements of the law of nations in respect to occupation and use of real property, the capture of public or private property which is useful to the belligerent in the prosecution of his military operations, the taking of private property by way of requisition and contribution, and the immunity from interference which is accorded to property devoted to religious, charitable, or educational uses. But the laws of war are silent, however, where the property taken by a belligerent is owned by his own subjects, or neutrals, or by subjects of the enemy who have been permitted to remain in the country after the outbreak of hostilities; they are also silent as to the right of an individual to compensation for property destroyed as a direct consequence of military operations, as by the fire of artillery or the movements of armies in battle.

In determining the responsibility of a state in this respect, the question must be regarded from several points of view, and the character of the war, as internal or external, the ownership of the property destroyed or appropriated, and the nature and cause of the injury or appropriation itself must all

IV Calvo, §§ 2466–2469. For the practice in the United States, see IV Calvo, §§ 2468, 2469; Inglis *vs.* Sailors' Snug Harbor, 3 Peters, 100; Dana's Wheaton, § 347, note 169; II Halleck, pp. 484–511; for the practice of France, see IV Calvo, §§ 2472, 2473.

be considered. Regard must be had, also, as to whether the injury consists in a taking of private property for public use, as where lands or buildings are appropriated for the construction of defensive works, or supplies are taken for public use; or as to whether such injury or destruction is due to acts of war, or is the direct and inevitable consequence of hostile operations, as where houses or buildings are destroyed during a bombardment, or where standing timber is cut down by the fire of artillery or is taken for the construction of field intrenchments, or where crops are trampled down and destroyed by the movements of troops during the progress of a battle.

In respect to the question of ownership, where the property is taken by a government from individuals residing within its own territory, as it is the duty of the state to protect *all* private property within its territorial limits, without regard to its ownership, the modern tendency is to obliterate the distinction between citizens and aliens, in this regard, and base the compensation, if any be made, upon the circumstances attending the appropriation or destruction of the property itself. If such appropriation of private property is for the public use, or is made with a view to secure the public defence, the property so taken is, as a rule, made the subject of compensatory damages. In no case, however, unless it be made the subject of treaty stipulations, is any greater protection afforded to the property of aliens than is afforded to the citizens or subjects of the state in whose behalf the appropriation is made; nor is the rule of compensation applied more liberally in the one case than in the other.[1] If, on the other hand,

[1] The method in which payment is to be made for private property thus taken for the public use is regulated and determined by the municipal law of the state by whom the property has been appropriated. If particular courts are given jurisdiction over such cases, claims for property thus appropriated must be brought before the tribunals empowered by law to ascertain the damage inflicted; if no such jurisdiction is conferred upon any of the courts of a state, the case may be presented, by way of petition, to the supreme legislative body or to the sovereign. In cases of alien ownership, if aliens are placed upon the same footing as citizens in respect to the institution of suits of

the damage or destruction is clearly due to an act of war, or to strict military necessity, or is an inevitable consequence of warlike operations, the loss lies where it falls, and the individual owner is not compensated save as an act of grace or charity.[1] In this case no distinction is made between citizens and aliens, or other foreign residents; and it matters not by whom the injury is inflicted, whether by the enemy or by the troops of the state of the injured party.[2]

this kind, their remedy is the same as that of the citizen; where the local law places them in a position of disadvantage, or where they are discriminated against, their claim may be made the subject of diplomatic presentation. See, also, Grotius, liv. iii. chap. xx. § 8; Vattel, liv. iii. chap. xv. § 232; II Dig. Int. Law, §§ 223–225.

[1] The rule in this matter is well stated by Vattel, who says that "these are merely accidents; they are misfortunes which chance deals out to the proprietors on whom they happen to fall. The sovereign, indeed, ought to show an equitable regard for the sufferers, if the situation of his affairs will admit of it, but no action lies against the state for misfortunes of this nature, for losses which she has occasioned, not wilfully, but through necessity, and by mere accident, in the exertion of her rights. The same may be said of damage caused by the enemy. All the subjects are exposed to such damages, and woe to him on whom they fall. The members of a society may well encounter such risk of property, since they encounter a similar risk of life itself. Were the state to indemnify all those whose property is injured in this manner, the public finances would soon be exhausted, and every individual in the state would be obliged to contribute his share in due proportion —a thing utterly impracticable. Besides, these indemnifications would be liable to a thousand abuses, and there would be no end of the particulars. It is therefore to be presumed that no such thing was ever intended by those who united to form a society."—Vattel, liv. iii. chap. xv. § 232.

[2] "The property o alien residents, like that of natives of the country, when 'in the track of war,' is subject to war's casualties, and whatever in front of the advancing forces that either impedes or may give them aid when appropriated, or which, if left unmolested in their rear, might afford aid and comfort to the enemy, may be taken or destroyed by the armies of either of the belligerents; and no liability whatever is understood to attach to the government of the country whose flag that army bears and whose battles it may be fighting; and, when actual, positive war is in progress, the commander of the armies in the field must be the judge of the existing exigencies and necessities which dictate such action. This is believed to be the universal rule at the present day; it is that which has been followed by the governments of Europe in recent wars."—II Dig. Int. Law, § 224, p. 587, § 225, p. 598; I Opin. Att.-Gen. p. 255; Ibid. p. 269; XII Ibid. p. 21; Hall, pp. 218, 219, note; Bluntschli, §§ 652, 661; Heffter, §

The rule above stated, however, is subject to the qualification that the injury complained of must have been inflicted during hostilities carried on in accordance with the generally recognized rules of civilized war.[1] The belligerent parties to a particular war, whether the war be external or internal in character, are presumed to follow the laws of war in the conduct of their military operations. If a belligerent fails to do so, however, the enemy, by a resort to acts of retaliation, may compel him to observe the rules of civilized warfare. If neutral states or their subjects suffer injury as a consequence of such failure, the injury may be redressed in the diplomatic way, or, if sufficiently serious, may authorize a resort to forcible measures of redress.

Responsibility of a State for Injuries Inflicted during Internal Wars. Where property of individuals, whether citizens or aliens, is injured during the progress of an insurrection or rebellion, a similar rule of responsibility prevails. In this connection, however, a distinction exists between the destruction of property due to lawlessness or mob violence and injury or destruction caused by insurgents in the prosecution of regular military operations. Foreigners who become resident in a particular state, or who own property therein, acquire such residence or ownership with full knowledge that internal disorders are likely to occur, and that, in consequence of such disorders, property may be injured or destroyed, either by those who are engaged in violating the laws or by the government itself in its endeavor to restore order. "The assembling of mobs happens in all countries; popular violence occasionally breaks out everywhere, setting law at defiance, trampling on the rights of citizens and private men, and sometimes on those of public officers and the agents of foreign governments especially entitled to protection. In

133; Klüber, § 256; II Dig. Int. Law, §§ 223–225; III Ibid. § 353; II Phillimore, p. 7; Mitchell *vs.* Harmony, 13 Howard, 115; The *William Baggaley*, 5 Wallace, 377; II Twiss, §§ 64–66; I Opin. Att.-Gen. p. 235; Love *vs.* The United States, 29 Court of Claims Reports (U. S.), pp. 332, 347.

[1] II Digest International Law, § 225; III Ibid. §§ 347–349.

these cases public faith and national honor require not only that such outrages should be disavowed, but also that the perpetrators of them should be punished wherever it is possible to bring them to justice; and, further, that full satisfaction should be made in cases in which a duty rests with the government, according to the general principles of law, public faith, and the obligations of treaties."[1]

When, however, the internal disorder attains the proportions of an organized rebellion, and the supreme government resorts to warlike methods with a view to its suppression, the operations undertaken to restore the authority and supremacy of the central government are carried on in accordance with the laws of war, and the parties, as they occupy the status of belligerents, become charged with the rights, duties, and responsibilities of belligerents as determined by the rules of international law.[2]

References. The student will find the subject of war most fully treated in the works of Halleck, Risley, and Phillimore in English, and in those of Calvo, Pradier-Fodéré, Guelle, and Ortolan in French. For discussions of the definition, justification, and causes of war, see also Vattel, liv. iii. chaps. i. and iii.; I Halleck, chaps. xv. and xvi.; Heffter, §§ 113–119; IV Calvo, §§ 1860–1898; II Twiss, §§ 22–41; VI Pradier-Fodéré, §§ 2650–2670; III Phillimore, pp. 1–17, 85–89; Bluntschli, §§ 510–536; II Ferguson, §§ 169–172; Hall, §§ 123–126; Lawrence, "International Law," § 155; Woolsey, §§ 114–117; Creasy, §§ 380–394. For the declaration of war and its effects, see Vattel, liv. iii. chap. iv.; Owen, "Declaration of War"; Bluntschli, §§ 510–536; II Ferguson, §§ 173–175; IV Calvo, §§ 1899–2032; III Phillimore, pp. 85–149; III Digest of International Law, §§ 333–337a.

[1] "The rule is not to be construed as proclaiming immunity to a belligerent for every outrage which may be perpetrated by those in its service, simply because they occurred during the time and upon the theatre in which hostilities were prosecuted. The injury, it may be conceded, must result from such military or naval measures as by the code of civilized warfare are recognized as legitimate." —II Dig. Int. Law, § 225. II Ibid. § 226; I Calvo, § 205; Hall, § 65; Bluntschli, § 380; Klüber, § 79; I Dig. Int. Law, §§ 46, 67.

[2] III Calvo, §§ 1280–1297; II Dig. Int. Law, §§ 223–225; Revue de Droit International, vol. i. p. 417; Bluntschli, § 380, bis; Hall, § 65; Vattel, liv. iii., chap. xviii. §§ 292–295.

347–351; VI Pradier-Fodéré, §§ 2670–2720; II Ortolan, pp. 11–23; Heffter, §§ 120–123; Risley, "Law of War"; Guelle, pp. 36–66; Bluntschli, §§ 510–536; I Halleck, chap. xvii.; Hall, §§ 123–126; II Twiss, §§ 31–41. For the rules of war on land, see Vattel, liv. iii. chaps. v. viii.–xiii.; II Halleck, chaps. xviii.–xx.; Risley, "The Law of War"; IV Calvo, §§ 2033–2065; VI Pradier-Fodéré, §§ 2721–2794; VII Ibid. §§ 2795–2880; Hall, §§ 15–18, 127–135; Heffter, §§ 537–643; Dr. Lieber's "Instructions for the Government of the Armies of the United States," Appendix A; "The Rules of War adopted by the Institute of International Law, at its Session at Oxford in 1880," Appendix F; "The Rules and Usages of War on Land adopted by the International Peace Conference at The Hague in 1899," Appendix E; Lawrence, "International Law," §§ 169–174; II Twiss, §§ 62–71; III Digest International Law, §§ 347–351; "Précis des Lois de Guerre," J. Guelle. For the treatment of property on land, see Vattel, liv. iii. chap. v. §§ 69–77; Ibid. chap. ix. §§ 160–173; Heffter, §§ 537–556, 644–663; II Halleck, chap. xxi.; Hall, §§ 136–142; IV Calvo, §§ 2199–2293; Dana's Wheaton, § 346, note 169; VI Pradier-Fodéré, §§ 2994–3065; II Twiss, §§ 62–71. For the rules of temporary occupation, see Hall, §§ 153–161; VII Pradier-Fodéré, §§ 2939–3065; Lawrence, "International Law," §§ 200–204; De Martens, "Précis," §§ 280–282; Klüber, § 265; Bluntschli, §§ 644–663; II Ferguson, §§ 187, 269; Heffter, §§ 537–556, 644–663; I Digest International Law, § 3; III Ibid. § 339; II Halleck, chaps. xxxiii. xxxiv.; Snow, pp. 109–113; Manning, pp. 188, 189; and Dana's Wheaton, § 346, note 169. For requisitions and contributions, see VII Pradier-Fodéré, §§ 3020–3065; Vattel, liv. iii. chap. ix. § 165; Bluntschli, §§ 653–656; Lawrence, "International Law," § 204; IV Calvo, §§ 2231–2293; II Guelle, pp. 176–238; Dana's Wheaton, § 346; III Digest International Law, § 339; III F. De Martens, §§ 263, 264; II Halleck, pp. 109–114. For the subject of conquest, see "Le Droit de Conquête," by M. L. A. de Montluc, vol. iii. "Revue de Droit International," p. 551; v. Ibid. p. 581; Hall, §§ 204-206; Dana's Wheaton, § 346, note 169; IV Calvo, §§ 2453–2490; I Digest International Law, §§ 3, 4, 11; III Ibid. § 354; Klüber, §§ 255–259; II De Martens, "Précis," §§ 279, 300, 333; Heffter, §§ 133,179; II Halleck, pp. 480–509; see, also, "La Guerre Actuelle," by C. F. Rolin-Jacquemyn, in vol. ii. "Revue de Droit International," pp. 643–718; iii. Ibid. pp. 288–384; iv. Ibid. p. 481; "L'Enfantement du Droit par Guerre," by H. Brocher de la Fléchère, vol. x. "Revue de Droit International," p. 473; xii. Ibid. pp. 60, 206; "The Administration of Alsace-Lorraine, 1870–1871," by Dr. Edward Loening, vol. iv. "Revue de Droit International," p. 622; v. Ibid. p. 69; "Hostilities Without Declaration," by M. Féraud-Giraud, vol. xvii. "Revue de Droit International," pp. 19–49. For attempts to codify the laws and usages of war, see the rules suggested by H. Brocher, vol. iv. "Revue de Droit International," pp. 25,

381, 406; v. Ibid. pp. 321–351, 566–577; for those of the Institute of International Law, see "Les Actes de la Conférence de Bruxelles, 1874," vol. vii. "Revue de Droit International," pp. 438–461; ix. Ibid. p. 133; for the code proposed by M. Ernest Lehr, "Les Lois de la Guerre sur Terre et sur Mer," see vol. xxv. "Revue de Droit International," pp. 321–337; for the similar project of Dr. Gefficken, see vol. xxvi. Ibid. p. 596. For proposals respecting general or proportional disarmament, and the settlement of international disputes without a resort to war, see "The Ultimate Problem of International Jurisprudence," by Professor James Lorimer, II Lorimer, pp. 183–298; "Political and Legal Remedies for War," by Professor Sheldon Amos; "The Evolution of Peace," by Professor T. J. Lawrence; Lawrence, "Essays in Modern International Law," pp. 234–278; "Propositions to Abate War," by Sir Henry Sumner Maine, "International Law," pp. 207–228; see, also, "The Declaration of the International Peace Conference at The Hague," in respect to the diminution of military expenditure, and "The Convention for the Peaceable Adjustment of International Disputes adopted by the Peace Conference at The Hague, on July 29, 1899."

CHAPTER XI

MARITIME CAPTURE: PRIZE: THE JURISDICTION AND PROCEDURE OF PRIZE-COURTS

Tendency of the Rules of Maritime War. The rules of war regarding the treatment of private property on land have been characterized by a marked and constant improvement since the beginning of modern history. To appreciate this change, it is only necessary to compare the laws of war on land, as they are now understood, with the barbarous practices that prevailed during the Thirty Years' War, or even with the corresponding usages during the Napoleonic wars at the beginning of this century. The tendency has been to give to war on land the character of an armed contest between belligerent governments, restricting its operations and effects to the armed forces engaged on either side, and exempting private persons and private property from its hardships wherever such exemption has been possible. There has been no such general improvement in the laws having to do with the treatment of private property at sea, and the rules regulating maritime capture have advanced but little since they were codified, more than eight hundred years ago, in the Consolato del Mare. As different states have, at different times, obtained undue preponderance at sea, their invariable tendency has been to shape the rules of maritime capture rather in accordance with their views of temporary policy and self-interest than in accordance with the rights of neutrals and the demands of humanity and civilization. From time to time proposals have been made to exempt from capture at sea all private property not contraband of war. These proposals have never been favorably received, however,

and there is no present prospect of the general discontinuance of a practice as unjust in principle as it is inefficient as a means of redressing an international wrong.

The Right of Maritime Capture. Of the right to capture private property at sea, which has been recognized from the earliest times, there can be no serious doubt; no principle, indeed, is better established at international law. As to the justice of the practice, however, and as to its efficiency as a means of injuring an enemy, there is a wide divergence of opinion. It is defended on the ground that a belligerent has the same right to injure his enemy by crippling and destroying his maritime commerce as by conducting operations against his armies on land; the destruction of his commerce operates less directly, it is true, but in some cases it redresses as decisively the wrong for which the war was undertaken as do victories gained over his armies and fleets; at the same time, as property is captured or destroyed, instead of human life, the purpose of the war is accomplished with greater humanity in the one case than in the other. It is also contended that, by attacking a single powerful interest—maritime commerce—in which large amounts of capital are invested and large numbers of persons employed, a considerable influence, in the interest of peace, is brought to bear upon the government of the enemy. It cannot be doubted that, in former times, these arguments were considerably more forcible than they are at present. Maritime commerce now belongs to the world and to humanity at large, and not, as formerly, to a state or to several states, and causes which operate to injure the commerce of a single state operate, with equal power, to injure not only the commercial interests but the material well-being of the entire civilized world, and so to inflict injury upon states which are in no sense parties to a particular war. Moreover, as peace is now the rule and war the exception, the effects of war should be restricted, more rigidly than ever before, to the nations directly concerned in its operations, either as belligerents or allies; and other states, not parties to the controversy, should be made to suffer

the least possible inconvenience in consequence of its existence.[1]

Position of the United States. The position occupied by the United States in this regard, since it became an independent member of the family of nations, has been altogether creditable; its influence has been steadily exerted in behalf of the extension of the rights and immunities of neutrals, and it has constantly adhered to and advocated the complete immunity of private property, not contraband of war, from capture or destruction on the high seas in time of public war. It declined to become a party to the Declaration of Paris, for reasons which were satisfactory to itself and consistent with its established policy in respect to maritime warfare, but signified its entire willingness to become a party to that convention on the single condition that all private property at sea, not contraband of war, should be exempt from the operation of the right of maritime capture.[2] As a further evidence of its disposition in this regard, the United States, at the close of the war of 1898 with Spain, by a formal enactment of Congress, abolished the practice of distributing prize-money among the crews of capturing vessels, and prohibited the award of bounty, or head-money, to the officers and crews of public armed vessels, for the capture or destruction of public armed ships of the enemy.[3]

[1] Vattel, liv. iii. chap. viii. §§ 195, 196; Ibid. chap. xv. § 229; Hall, pp. 445–447, note; Dana's Wheaton, § 355, note 171; Lawrence's Wheaton, p. 628, note 192; II Ortolan, pp. 35–56; II Twiss, §§ 72–77; II Ferguson, §§ 198–201; IV Calvo, §§ 2294–2410; II Lorimer, pp. 94–114; Bluntschli, §§ 664, 665; Manning, pp. 183, 184, note; Woolsey, § 147; Lawrence, Int. Law, §§ 206, 207, 216, 217; III Dig. Int. Law, §§ 342–346; Amos, Political and Legal Remedies for War, pp. 196–215, note.

[2] III Dig. Int. Law, § 342; Upton, Maritime Warfare, pp. 179–185; Dana's Wheaton, §§ 358, note 173, 475, note 223; Woolsey, § 128; II Ortolan, pp. 38, 69.

[3] The prohibition here referred to was accomplished by the passage of the following enactment: "All provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed."—Act of March 3, 1899, 30 Stat. at Large, p. 1007. "The allowance of prize-money to public armed vessels is

Forces Employed in Maritime War. The forces that may be employed in naval operations have already been described, and may consist of the regular naval establishment of the belligerent state, supplemented by such maritime volunteer or militia forces as may be deemed necessary by the state which employs them. Unless the right to use that species of force has been formally abandoned, or prohibited by the stipulations of treaties, a state may also make use of privateers.

Captures, where made. In addition to the operations directed against the naval power of the enemy, and their employment in the attack or defence of fortified places on the coasts of the several belligerents, an important part of the duty of the naval forces of a state, in time of war, consists in the exercise of the right of search, in the establishment and maintenance of blockades, and in harassing the enemy's commerce by the capture or destruction of his merchant ships and their cargoes on the high seas. No such captures are lawful, or can be made, however, save with the express authorization of the captors' state; the making of captures without such governmental authorization constituting the offence of piracy. Captures may be made on the high seas, or within the territorial waters of either belligerent.[1] Under no circumstances, however, can they be lawfully made in neutral waters; such

of relatively recent origin; it was allowed by the Dutch in 1702, and by the French in 1692."—IV Dodson, Adm. Rep. p. 316, note.

[1] The *Joseph*, 1 Gallison, 545; the *Grotius*, 9 Cranch, 368; the *Hercules*, 2 Dodson, Adm. Rep. p. 363; II Ortolan, p. 57; III Phillimore, §§ 347–349; Hall, §§ 270–274; III Dig. Int. Law, §§ 341–346; IV Calvo, §§ 2310–2315; Upton, p. 190. "It is a universal principle, which applies to those engaged in a partial as well as to those engaged in a general war, that where there is probable cause to believe the vessel met with at sea is in the condition of one liable to capture, it is lawful to take her and subject her to the examination and adjudication of the courts."—Talbot *vs.* Seeman, 1 Cranch, 1. "The capture of a neutral ship having enemy's property on board is a strictly justifiable exercise of the rights of war. It is no wrong done to the neutral, even though the voyage be thereby defeated. The captors are not therefore answerable *in pœnam* to the neutral for the losses which he may sustain by a lawful exercise of belligerent rights. It is the misfortune of the neutral and not the fault of the belligerent."—The *Antonia Johanna*, 1 Wheaton, 159.

captures being unlawful, and prizes thus taken must be restored to their owners, with suitable apology and reparation to the neutral government whose territorial sovereignty has been invaded.[1]

Prize. The term "prize" is applied to all captures of property made at sea, or in the territorial waters of a belligerent, in time of war; it corresponds to the term "booty," which is applied to similar captures of property on land.[2] As the capture is made on its authority and upon its responsibility, the title to the captured property first vests in the captor's government, and its further disposal is regulated by its municipal law. It may therefore make such disposition of its prize as it deems best; it may convert it to its own use, or cause it to be destroyed or sold; and it may distribute the whole or a part of the proceeds of the sale among the captors, in accordance with the provisions of its municipal law.[3]

There has been some difference of opinion as to the precise instant when the title to a prize passes from the original owner and vests in the captor's government. Three rules have been applied: 1. *The twenty-four-hour rule*, based upon twenty-four hours of secure possession on the part of the captor; 2. *The rule of pernoctation*, according to which the prize must have

[1] See the title "Neutral Rights" in the chapter entitled "Neutrality." "If a ship or cargo is enemy property, or if either be otherwise liable to condemnation, the circumstance that the vessel at the time of the capture was in neutral waters would not, by itself, avail the claimants in a prize-court. It might constitute a ground of claim by the neutral power, whose territories had suffered trespass, for apology or indemnity. But neither an enemy nor a neutral acting the part of an enemy can demand restitution of captured property on the sole ground of capture in neutral waters."— The *Sir William Peel*, 5 Wallace, 517; the *Adela*, 6 Wallace, 266; the *Anne*, 3 Wheaton, 435; III Phillimore, §§ 349–355; IV Calvo, §§ 2654–2667; Upton, Maritime Warfare, pp. 198–200; the *Twee Gebroeders*, 3 Robinson, Adm. Rep. pp. 162, 164; the *Vrow Anna Katharina*, 5 Rob. 15; the *Anna*, 5 Ibid. 373.

[2] Vattel, liv. iii. chap. xii. § 196; Dana's Wheaton, § 359; II Halleck, p. 115; Hall, § 149; III Phillimore, § 347; Risley, p. 144; V Calvo, §§ 3005, 3009.

[3] Hall, § 150; III Phillimore, § 356; the *Felicity*, 2 Dodson, Adm. Rep. pp. 381, 386; the *Acteon*, Ibid. p. 52; Dana's Wheaton, § 388, note 186, par. v.; V Calvo, §§ 3010, 3011.

been in possession of the captor during the period between sun and sun; 3. *The rule of cessation of resistance*, by which the title is held to pass to the captor when armed resistance ceases and the flag is struck or a voluntary surrender is made. The last rule is now the one most generally accepted.[1]

The title to captured property, since it is acquired by an act of force, is inchoate and incomplete until it has been taken before a prize-court of the captor's state and the legality and regularity of its capture have been authoritatively determined. Until such adjudication has been had, the right of property is in abeyance, and the title vests in the captor's government, in trust for the benefit of those who may ultimately become entitled to share in its distribution.[2]

Duty of Captor: Prize-Crews. It is the first duty of a captor to convey his prize into a court of his own country for adjudication. In former times he was permitted to take his prize into a neutral port. This is still the rule of international law, but the almost invariable practice of neutrals in recent wars has been to forbid such a use of their ports except in cases of distress or emergency.[3]

Vessels captured on the high seas are sent into port under

[1] II Halleck, pp. 383, 384; III Phillimore, §§ 348, 357; Dana's Wheaton, § 359; Vattel, liv. iii. chap. xii. § 196; the *Peterhoff*, Blatchford, Prize Cases, p. 620.

[2] Manning, p. 476; II Halleck, p. 383; Hall, § 149; Snow, p. 166; Dana's Wheaton, § 388, note 186

[3] II Phillimore, §§ 361 – 364; Dana's Wheaton, § 388, note 186; Vattel, liv. iii. chap. xiii. § 196; II Halleck, p. 385; Hall, § 277; V Calvo, §§ 3012–3033; Snow, p. 166; the *Wilhelmsbrog*, 5 Robinson, Adm. Rep. p. 143; the *Catharina Elizabeth*, 1 Acton, Adm. Rep. p. 309. "A captured vessel must be brought within the jurisdiction of the country to which the captor belongs before a regular condemnation can be awarded."—I Opin. Att.-Gen. p. 78. "Captures must be determined upon competent evidence, and no rules for determining the competency of such evidence are more proper for the use of the executive department than those which prevail in the courts of admiralty."—I Ibid p. 401. "Though it is the duty of the captor, under the law of nations, affirmed by the act of Congress (Rev. Stat., § 4615), to send in captured property for adjudication by a court of his own country having competent jurisdiction, yet he may be excused by imperative circumstances for making a sale of such property and afterwards seasonably subjecting the proceeds to the jurisdiction of a proper court of prize."—Jecker *vs.* Montgomery, 13 Howard, 498.

charge of a prize-master, who, with an adequate prize-crew, is placed on board for that purpose. It is the duty of the prize-master to secure the ship and goods in his charge from spoliation or damage during the homeward passage, and to deliver his prize, immediately upon her arrival, into the legal possession of the court having jurisdiction over the case. The ship's papers, log-book, register, sea-letters, and bills of lading are sealed by the commanding officer of the capturing vessel, and they, with two or more members of the ship's company, are conveyed into port by the prize-master, and are delivered with the prize into the custody of the court.[1]

Crews of Captured Vessels. The crews of enemy merchant vessels captured on the high seas become prisoners of war, and are entitled to the rights guaranteed to that class by the rules of war. The crews of captured neutral vessels cannot be regarded as prisoners of war. They are simply detained subject to the action of the prize-court upon the ship on board of which they are employed. They are not enemies, and are not subject to detention or punishment. No measures of severity towards them are justifiable except in cases of great emergency, and for such injuries, when shown to be unnecessary, prize-courts may decree damages to the injured parties.[2]

The Ransom of Captured Vessels. The practice of furnishing prize-crews tends to deplete the fighting strength of the captor, and, if a number of captures are made, a time must come when a commander, having a due regard to the safety and efficiency of his own ship, can no longer make such detachments from his crew. This emergency is recognized and provided for by the law of nations, and by the municipal law of most states, which authorize him in such an emergency to destroy his prize or to accept a ransom.[3]

[1] II Halleck, p. 409; III Phillimore, §§ 348–355; Hall, § 277; Dana's Wheaton, § 388, note 186, par. v.; II Twiss, § 166; the *Purissima Concepcion*, 5 Robinson, Adm. Rep. p. 33; *Die Fire Danier*, Ibid. p. 356; the *William*, 6 Ibid. p. 316.

[2] III Phillimore, p. 690; Snow, p. 155.

[3] Abdy's Kent, p. 276. "If the prize is a neutral ship, no circum-

Destruction of Captured Vessels. As the present tendency of neutral states is to close their ports to maritime prizes, such disposition of prizes is more likely to increase than decrease in frequency. The practice of destroying prizes has been objected to, but rather on the ground of humanity than legality. If the right to capture enemy property at sea be admitted, the right to destroy it follows as a natural consequence. The title of the original owner has been forcibly divested by an act of war. If any injury has been inflicted upon the belligerent, that injury consists in the fact of capture, which amounts to a destruction of the property in so far as the owner and his government are concerned. It can matter little to either what disposition is made of the property after the owner's title has been extinguished.[1]

Ransom Contracts. Ransom consists in an agreement entered into between a captor and the master of a captured vessel, acting in behalf of the owners, by which, in consideration of the latter binding himself to pay a stipulated sum, he is permitted to continue his voyage, by a specified route, to a certain port of destination. The instrument containing this agreement is called a *ransom contract*, and, when regularly made, its binding force is recognized by the law of nations.[2]

The ransom contract is executed in duplicate, one copy being retained by the captor, and the other by the master of the captured vessel, to whom it serves as a safe-conduct during the rest of his voyage. The precise route to be pursued is stated in the contract, and if he departs from it he is liable to a second capture. In this case the ransom contract consti-

stances will justify her destruction before condemnation. The only proper reparation to the neutral, in such a case, is to pay him the full value of the property destroyed."—II Twiss, International Law during War, § 167, p. 331. The *Felicity*, 2 Dodson, Admiralty Reports, p. 386; Boyd's Wheaton, pp. 432, 433.

[1] Hall, § 150; the *Felicity*, 2 Dodson, 381, 386; the *Leucade*, Spinks, 221; V Calvo, § 3059; Risley, p. 149; Ord. de la Mar. p. 281; II Twiss, § 166; Dana's Wheaton, § 388, note 186, par. 6.

[2] I Kent, pp. 104–110; II Halleck, pp. 358–361; Snow, p. 102; Creasy, pp. 563, 564; II Twiss, § 180; Hall, § 151; Risley, p. 150; II Ferguson, § 206; Upton, pp. 247, 248.

tutes a prior lien upon the prize, and must be satisfied out of the proceeds of the sale, the remainder only being decreed to the second captor. The copy of the ransom contract which is furnished the enemy master is, in effect, a guarantee against capture by another cruiser of the captor's state while in prosecution of the voyage described in the agreement. He forfeits whatever protection the contract gives him if he is found out of the course therein prescribed, unless driven from it by stress of weather or other evident necessity. The contract usually specifies that, if the ship is wrecked on the high seas, or by the perils of the sea, the instrument is void. It is otherwise, however, in case the vessel be stranded, or wrecked intentionally by the master. "If the captor, after having ransomed an enemy's vessel, is himself taken by the enemy, together with the ransom bill of which he is the bearer, this ransom bill becomes a part of the capture made by the enemy, and the persons of the hostile nation who were debtors of the ransom are thereby discharged from their obligation under the ransom bill."[1] If the ransom contract has been conveyed to the captor's state, or to a place of safety, prior to capture, it retains its obligatory character.[2]

Ransom contracts constitute one of the exceptions to the rule of non-intercourse between enemies in war, and a suit to recover, on such a contract, should not be barred because the plaintiff is an alien enemy. The intercourse which is implied by the negotiation of such an instrument is a recognized necessity of war, and, for the purpose of enforcing his legal right, an alien enemy should be recognized as having a legal standing in the courts of the debtor's state. Indeed, such is the course pursued by most modern states. England alone constitutes an exception to the rule. "The English courts have decided that the subject of an enemy is not permitted to sue in the British courts of justice, in his own proper person, for the payment

[1] II Halleck, p. 360; Hall, § 151; Snow, pp. 101, 102; Glass, p. 59.

[2] I Kent, pp. 104–108; Boyd's Wheaton, § 411; II Twiss, §§ 180–183; II Halleck, pp. 358–361; II Ferguson, § 206; Woolsey, § 150; III Phillimore, p. 644; Upton, pp. 247–248.

of a ransom, on the technical objection of the want of a *persona standi in judicio*, but that the payment could be forced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom. This technical objection is not based upon principle nor supported by reason, and the decision has not the sanction of general usage."[1]

Hostages. It was the practice in former times to give hostages to the captor as additional security for the payment of ransom. They were conveyed to the captor's country, and were there detained as prisoners until the ransom was paid. They were not always treated as prisoners of war, however, but were at times subjected to special hardships and restrictions, imposed upon them with a view of constraining the payment of the ransom contract. If they died in captivity the ransom contract still remained binding, as they were only regarded as collateral security for its payment.[2]

Recapture and Postliminy. When a prize has been made at sea, it has been seen to be the duty of the captor to send it to a port of his own country, or that of an ally, for adjudication. In the prosecution of this voyage it is liable to recapture, and a question arises as to its ownership in such a case. The prize has been recaptured by an armed vessel of the same nationality as the original owner; but the recapture, in so far as the recaptor is concerned, was attended by the same risk and danger that would have been involved in an original capture of the same vessel from the enemy. The captor has acquired certain rights in the prize, and, at the same time, the title of the original owner to the property has been to a certain extent revested. The fiction of law which has been invented to adjust these conflicting claims is borrowed from the Roman law, and is called the *rule of postliminy*.[3] It was applied by the Romans to all captures of

[1] II Halleck, p. 361; Boyd's Wheaton, p. 411; the *Hoop*, 1 Rob. Adm. Rep. pp. 169, 201.

[2] II Halleck, pp. 360, 536; Woolsey, § 150; the ships taken at Genoa, 4 Rob. 388.

[3] Upton, p. 234; Creasy, pp. 510 511; I Kent, pp. 104–108; the *Res-*

persons or property made by an enemy in war, and a similar rule applied to such portions of the public territory as passed into the hands of an enemy as the result of conquest. The title to captured property vested in the captor so long as it remained in his secure possession. As prisoners taken in war became the slaves of their captors, their status in Rome, as freemen, was suspended during captivity. If slaves were captured the rule of property applied. When *recaptured* from the enemy the title of the original owner was revived, and the property was restored to him on payment of salvage. A person who was recaptured became, according to the rule of war, the property of his recaptor; but the law permitted him to resume his freedom, or citizenship, upon the payment of a specified sum.[1]

The modern rule of postliminy resembles in principle the rule of the Roman law, although it is more just and humane in its application. Persons recaptured in war resume, at once, all their personal and property rights. Slavery and private ransom are alike discountenanced by international law. Property recaptured from an enemy on land, if possible of identification, reverts to its owner without cost or payment. Property recaptured from an enemy at sea is restored to its original owner, but is charged with the payment of a reward to the recaptor, to reimburse him for the risk incurred and the service rendered.[2] The reward paid to recaptors for the recovery of property captured at sea is called *salvage*. The amount of salvage to be paid, in any particular case of recapture, is determined by a prize-court, in accordance with the municipal law of the recaptor's state. The amount of salvage awarded varies with the difficulty of recapture and the value of the prize. It depends also upon the character of the vessel

olution, 2 Dallas, 115; Pothier, Traité du Droit de Propriété, Nos. 134, 135; III Phillimore, pp. 644–647; II Halleck, pp. 358–361; Boyd's Wheaton, §§ 411, 411a; V Calvo, §§ 3169–3173, 3184.

[1] Inst. liv. i. chap. xii. § 5; I Kent, p. 109; Woolsey, § 151; II Phillimore, pp. 615, 616; V Calvo, § 3184.

[2] Boyd's Wheaton, pp. 435, 465, 466; Hall, pp. 486–493; II Halleck, pp. 512–524; Woolsey, §§ 151–153; Upton, pp. 234–241; III Phillimore, pp. 615–643; V Calvo, §§ 3169–3173.

by which the recapture is made, the award being greater in the case of a privateer or merchant vessel than in that of a vessel of war; none being awarded for the recapture of one public armed vessel by another. "In general no salvage is due for the recapture of neutral vessels and goods, upon the principle that the liberation of a *bona fide* neutral, from the hands of the enemy to the captor, is no beneficial service to the neutral, inasmuch as the same enemy would be compelled, by the tribunals of his own country, to make restitution of the property thus unjustly seized." [1]

As recapture is possible only between the place of original capture and the port to which it is sent by the captor, the right of postliminy exists between the same limits of time and place. The title of the original owner is finally extinguished by the action of the prize-court in decreeing the condemnation and sale of the captured property; and the title acquired by the purchaser is good, even against the original owner or his government. If such property be recaptured after it has been regularly condemned and sold, it is not restored to the original owner, but is regarded as lawful prize, and is treated as such.[2] England furnishes the only exception to this rule.

[1] Boyd's Wheaton, p. 435; I Halleck, p. 189; II Ibid. pp. 514–537; Woolsey, § 152; Hall, § 152; Upton, pp. 241–251; II Twiss, p. 345. For the law of the United States on the subject, see § 4652 of Revised Statutes of the United States. For that of France, England, Spain, Portugal, Denmark, Sweden, Holland, see Boyd's Wheaton, pp. 442–450; Snow, p. 105; the *Santa Cruz*, 1 Robinson, Adm. Rep. p. 50; the *Ceylon*, 1 Dodson, 105, 117–120.

[2] Hall, pp. 493–495; II Halleck, pp. 522, 523; III Phillimore, pp. 617, 618; Upton, pp. 233–242; Valin, Traité des Prises, liv. iii. tit. ix. art. 10. "In cases of recapture the rule of reciprocity is applied. If France would restore in a like case, then we are bound to restore; if otherwise, then the whole property must be condemned to the recaptors. It appears that by the law of France in cases of recapture, after the property has been twenty-four hours in possession of the enemy, the whole property is adjudged good prize to the recaptors, whether it belonged to her subjects, to her allies, or to neutrals. We are bound, therefore, in this case to apply the same rule; and as the property in this case was recaptured after it had been in possession of the enemy more than twenty-four hours, it must, so far as it belonged to persons domiciled in France, be condemned to the captors."—Schooner *Adeline*, 9 Cranch, 244 [288]; the *Santa Cruz*, 1 Robinson, Adm. Rep. p. 50; the *Belle*

According to the English law, property recaptured during the continuance of a war is restored to its owner upon payment of salvage, no matter how long it has been in the enemy's possession nor through how many hands it may have passed in the way of purchase and sale. A treaty of peace is alone held to confirm and perfect the title to captures made during a war.[1]

PRIZE-COURTS

Prize-Courts and their Jurisdiction. Whenever a capture has been made at sea, it becomes the first duty of the captor to cause it to be conveyed to a port of his own country, or that of an ally, for adjudication. The municipal laws of all states provide special tribunals whose duty it is to determine questions of prize. These tribunals are called *Prize-Courts*, and as the decision of such questions is an incident of admiralty jurisdiction, the admiralty courts of most states are given jurisdiction over cases of maritime capture. This power may be vested in these courts as a branch of their general admiralty jurisdiction, or jurisdiction may be conferred upon them by special commission during a particular war. The former practice prevails in the United States, the latter now prevails in England.[2]

Prize-courts may sit in the ports or territory of a belligerent or in those of an ally. They cannot sit in neutral ports, even with the consent of the neutral government,[3] and a belligerent would justly regard the granting of such permission as a violation of neutral obligation. This arises from the peculiar jurisdiction of these tribunals. Prize-courts do not try crim-

Edwards, Adm. Rep. p. 66; the *Wight*, 5 Robinson, 315.

[1] II Halleck, pp. 514–526; 27 and 28 Victoria, chap. xxv. § 40; III Phillimore, §§ 418–436.

[2] II Halleck, pp. 415–422; II Ferguson, § 282; Creasy, § 519. "In the United States the district courts have original jurisdiction in prize cases, subject to appeal, however, direct to the Supreme Court of the United States."—V Calvo, §§ 3035–3044; III Phillimore, §§ 437–439.

[3] Boyd's Wheaton, § 385; II Halleck, pp. 422, 423; Snow, pp. 166, 167; Manning, pp. 474, 475; the *Heinrich* and *Maria*, 4 Robinson, Adm. Rep. p. 43; V Calvo, §§ 3045–3065; Dana's Wheaton, §§ 387–389, note 186.

inal cases or determine controversies arising between individuals. The question before them in case of a particular capture is whether, according to the law of nations, the ship and cargo were liable to capture, and, if so, whether the capture was lawfully made. If their decision be in the affirmative, the ship and cargo are condemned; if the decision be in the negative, they are released. In its investigation of the circumstances of the capture, and in reaching a decree of condemnation, the court, to a certain extent, acts in behalf of the state under whose authority it sits, and its decree fixes upon that government, in the highest degree, the responsibility for the seizure and condemnation of the enemy's property or contraband goods. Its action, therefore, to a much greater degree than is the case with ordinary judicial proceedings, constitutes an act of sovereignty, and for this reason it cannot perform such an act within the jurisdiction of another sovereign state.[1]

The Law Applied by Prize-Courts. In deciding cases of maritime capture prize-courts apply the rules of international rather than municipal law. For this reason decisions in similar cases, rendered by the prize-courts in other states, are regarded by them as constituting precedents of a binding character. "Prize-courts are in no way bound to regard local ordinances and municipal regulations, unless they are sanctioned by the law of nations. Indeed, if such ordinances and regulations are in contravention of the established rules of international jurisprudence, prize-courts must either violate their duty or entirely disregard them. They are not binding on the prize-courts, even of the country by which they are issued. The stipulations of treaties, however, are obligatory upon the nations which have entered into them, and prize-courts must observe them in adjudicating between subjects or citizens of the contracting parties."[2]

[1] II Halleck, pp. 422, 423; III Phillimore, §§ 433–436; V Calvo, §§ 3056, 3057; Dana's Wheaton, § 389.

[2] II Halleck, pp. 433–436; II Ferguson, § 282; Creasy, § 519; Snow, pp. 165, 166; the *Fox*, Edw. Adm. Rep. p. 312; the *Recovery*, 6 Rob.

Procedure in Prize Cases. The principles of prize, as at present applied to maritime captures, are almost identical with the provisions of the Roman law on the same subject. "The allegations, proofs, and proceedings are therefore, in general, modelled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose. . . . Not only the proceedings, but also the rules of evidence, are, in many respects, different from those of courts of common law; and prize-courts not only decide upon the claims of captors, but also upon their conduct in making the capture, and subsequently, and not infrequently, declare a forfeiture of their rights with vindictive damages.

"In prize cases the evidence to convict or condemn must come, in the first instance, from the papers and crew of the captured ship. It is the duty of the captors to bring the ship's papers into the registry of the district court, verify them on oath, and to have the examinations of the principal officers and seamen of the captured ship taken on the standing interrogatories, and not *viva voce*. It is exclusively upon these papers and examinations that the case is to be heard in the first instance. If, from this evidence, the property clearly appears to be hostile or neutral, condemnation or restitution immediately follows. If the property appears to be doubtful,

Adm. Rep. pp. 348, 349; III Phillimore, §§ 433–436; Boyd's Wheaton, §397a; the *Maria*, 1 Rob. Adm. Rep. p. 350. "The law of prize is part of the law of nations. In it a hostile character is attached to trade, independently of the character of the trader who pursues or directs it."—The *Rapid*, 8 Cranch, 155 [162]. "The condemnation of a vessel and cargo in a prize-court is not a criminal sentence. No person is charged with an offence, and so no person is in a condition to be relieved and reinstated by a pardon."—10 Opin. Att.-Gen. p. 452. "Prize-courts are subject to the instructions of their own sovereign. In the absence of such instructions their jurisdiction and rules of decision are to be ascertained by reference to the known powers of such tribunals, and the principles by which they are governed under the public law and the practice of nations."—The *Amy Warwick*, 2 Sprague, 123. "Neither the President nor any military officer can establish a court in a conquered country and authorize it to decide upon the rights of the United States or of individuals in prize causes, or to administer the law of nations."—Jecker *vs.* Montgomery, 13 Howard, 498.

or the case suspicious, further proof may be granted according to the rules which govern the legal discretion of the court, if the claimant has not forfeited his right to it by a breach of good faith. . . . Where the national character does not distinctly appear, or where the question of proprietary interest is left in doubt, further proof is usually ordered."[1]

The common-law doctrines, as to the competency of witnesses, are not applicable to prize proceedings. No person is incompetent in those courts merely on the ground of interest. His testimony is admissible, subject to all exceptions as to its credibility.[2] The rule that the testimony, for the condemnation of a prize, must be obtained, in the first instance, directly from documents or witnesses found on board the vessel at the time of her seizure, is always adhered to, unless satisfactory reasons are shown for departing from it in a particular instance.[3]

Right of Appeal in Prize Cases. The right of appeal is invariably recognized in the laws creating prize-courts and defining their jurisdiction; and, on account of the importance of the interests involved, special provision is frequently made to enable prize cases to be carried up, by way of appeal, to a court of last resort, in a much shorter time than is usual, and without passing through any of the courts intervening between those of original and final jurisdiction. The laws of the United States provide for this contingency by permitting an appeal to be taken directly to the Supreme Court, from the district courts, which, in the United States, have original jurisdiction in all cases of maritime capture.[4]

DISTRIBUTION

Prize-Money. It has been seen that the title to captured property is vested, by the decree of condemnation, in the government of the ship by which such capture is made; its sub-

[1] II Halleck, pp. 434–436; Upton, pp. 396–434; III Phillimore, §§ 441–518; V Calvo, §§ 3060–3087.

[2] The *Anne*, 3 Wheaton, 435.

[3] The *Zavalla*, Blatchford, Prize Cases, p. 173; the *Jane Campbell*, Blatchford, Prize Cases, p. 101.

[4] Upton, pp. 433, 434.

sequent disposition is regulated by the municipal law of the captor's state. The proceeds of the sale of ships and cargoes which have been regularly captured and condemned is called *prize-money*, which, by the law of most states, is distributed among officers and crews of the vessels or fleets by whom the capture was made. Such was the law of the United States, in respect to the distribution of the proceeds of maritime prizes, from the establishment of the government under the Constitution until the close of the war of 1898 with Spain, when, by a formal enactment of Congress, all laws authorizing the distribution of the proceeds of the sale of prizes, as well as those authorizing the payment of bounty or head-money were finally repealed.[1]

Privateers. In case of privateers, prize-money is distributed among the owners, officers, and crew in accordance with any agreement which may have been made by them for that purpose; in the absence of such an agreement, however, one-half of the prize-money is awarded to the owners and one-half to the officers and crew, which is distributed in accordance with the same rules as are applied to public armed vessels.

Head-Money. In addition to the distribution of prize-money, as above described, a further bounty is frequently allowed the officers and crew of a public armed vessel for every person on board any ship or vessel of war of the enemy at the beginning of an engagement which is sunk or disabled as a result of such engagement. The amount of bounty, or head-money, as it is called, is fixed at a certain sum per man where the enemy is of inferior force, a larger allowance being made where the enemy's ship is of equal or superior force.[2]

Rules for Determining the Nationality of Ships and Goods. It has been seen that, in the determination of a question of prize, the decision will depend upon whether the prop-

[1] Section 13 Act of March 3, 1899 (30 Statutes at Large, p. 1007); sections 4630–4635 and 4643 of the Revised Statutes were repealed by this enactment.

[2] Head-money and bounty were abolished in the United States by section 13 Act of March 3, 1899 (30 Statutes at Large, p. 1007).

erty seized has, or has not, the enemy character. To determine questions thus arising, as to the nationality of ships and goods, certain rules are recognized by the prize-courts of all nations. The more important of them are—

(*a.*) The nationality of ships and goods is, in general, determined by the domicile of their owner. Those owned by one domiciled in a hostile country are enemy goods; those owned by one having a domicile in a neutral state are neutral goods.[1]

(*b.*) The products of hostile soil, and articles manufactured in enemy's territory, are hostile, by whomsoever owned.

(*c.*) The share of a neutral partner, in a firm having a hostile domicile, is hostile.

(*d.*) If an owner of, or partner in, a business situated in a neutral state has himself a hostile domicile, his share in the neutral house is regarded as enemy property.

(*e.*) A neutral sailing under the enemy flag, or carrying his register or license to trade, is regarded as an enemy.

(*f.*) The nationality of goods is determined by their ownership at the instant of capture; a change made in ownership after that date is not recognized.

(*g.*) "Vessels of discovery, or of expeditions of exploration and survey, sent for the examination of unknown seas, islands, and coasts, are by general consent exempt from the contingencies of war, and are therefore not liable to capture. Like the sacred vessel which the Athenians sent with their annual offerings to the temple of Delos, they are respected by all nations, because their labors are intended for the benefit of all mankind. It has been the invariable practice of European powers to grant safe-conducts to ships sent to explore the Arctic regions, against being captured by ships of war on their return, in the event of war breaking out during such absence."[2]

(*h.*) "Fishing-boats have also, as a general rule, been exempted from the effects of hostilities. As early as 1521, while

[1] Walker, part iii. chap. v. § 40; the *Phœnix*, 5 C. Rob. Adm. Rep. p. 20.

[2] II Halleck, pp. 142–151; III Phillimore, §§ 483–485; II Twiss, §§ 152–165; IV Calvo, §§ 2294–2410, 3088–3114.

war was raging between Charles V. and Francis I., ambassadors from these two sovereigns met at Calais, then English, and agreed that, whereas the herring fishery was about to commence, the subjects of both belligerents engaged in this pursuit should be safe and unmolested by the other party, and should have leave to fish as in time of peace. In the war of 1800 the British and French governments issued formal instructions exempting the fishing-boats of each other's subjects from seizure." [1]

References. For the rules of maritime capture, see Hall, §§ 149–152; II Ortolan, pp. 1–75; Glass, "Marine International Law," pp. 155–169, 179–198; II Halleck, chaps. xxii. and xxxi.; Snow, pp. 85–88, 163–167; IV Calvo, §§ 2033–2132, 2199–2410; V Ibid. §§ 3004–3034; Manning, chap. v.; Dahlgren, "International Law"; Nys, "La Guerre Maritime"; Bluntschli, "Le Droit de Butin en Général, et Spécialement du Droit de Prise Maritime," vol. ix. "Revue de Droit International," p. 508; Ibid. vol. x. p. 60; III Phillimore, pp. 559–614; II Twiss, §§ 166–207; II Ferguson, §§ 202–205; Gessner, "Sur la Reforme du Droit de Guerre Maritime," vol. vii. "Revue de Droit International," pp. 236–269; Ibid. vol. x. p. 490; Bulmerincq, "Le Droit de Prises Maritime," Ibid. vols. x.–xiv.; Upton, pp. 233–254; Digest International Law, §§ 342–346; Lawrence, "International Law," chap. iv. For recapture, salvage, and postliminy, see Lawrence, "International Law," § 209; II Twiss, §§ 172–175; V Calvo, §§ 3169–3236; Hall, §§ 151, 152, 162–166; III Phillimore, pp. 615–647; Creasy, § 528; Upton, pp. 233–254; Ferguson, §§ 207–210; II Halleck, pp. 512–538. For prize-courts and their jurisdiction, see II Halleck, pp. 411–442; III Digest International Law, §§ 328–330, 363; V Calvo, §§ 3035–3114; III Phillimore, pp. 648–769; Manning, chap. xiiii.; Upton, pp. 383–469; "Les Tribunaux de Prise, et Leur Reforme," vol. xiii. "Revue de Droit International," p. 260; Risley, pp. 144, 249–264; Dana's Wheaton, p. 388, note 186; Lawrence, "International Law," §§ 212–215; see, also, the English Admiralty Reports of Robinson, Dodson, Acton, and Edwards, the Reports in Prize Cases of the Supreme Court of the United States, and the prize decisions of Blatchford and Story.

[1] II Halleck, pp. 151, 152; IV Calvo, §§ 2367–2376; I Ortolan, p. 160; II Ibid. p. 51; Bluntschli, § 667; Heffter, § 137.

CHAPTER XII

NEUTRALITY: THE NEUTRAL RELATION: RIGHTS AND DUTIES OF NEUTRALS

Neutrality. It has been seen that the outbreak of war between two or more states, and, in certain cases, the occurrence of a purely internal war, operate to place all other states of the civilized world in a peculiar status of non-interference in respect to the operations of war; to the relation thus created between the states which become parties to the war and those which refrain from participation in its operations — either as belligerents or allies — the term *neutrality* is applied, and a *neutral state* may be defined as one which wholly abstains from taking part in an existing war and renders no aid or service to either belligerent in his military operations.[1]

Character of the Neutral Relation. In strictness, the relations existing between two states, at any time, must be either those of peace or war. International law recognizes no intermediate condition. When a state occupies the position of a neutral it simply undertakes to maintain, without interruption, its peaceful relations with both belligerents. The maintenance of such relations is, of course, more difficult in war than in time of profound peace; and to this end a neutral state finds itself obliged to take such precautions, within its territorial limits, as will guarantee the continuance of such

[1] Vattel, liv. iii. chap. vii. § 104; Grotius, liv. iii. chap. xvii.; II Halleck, p. 173; Boyd's Wheaton, §§ 435, 436; Hall, pp. 81, 82; Creasy, §§ 531, 532; Woolsey, § 163; Risley, pp. 171, 172; III Phillimore, p. 225; II Ferguson, § 226; I Kent. pp. 116, 117; Upton, p. 259; Bluntschli, §§ 742, 743; Klüber, §§ 279, 280; IV Calvo, §§ 2491–2493; Heffter, § 144.

friendly relations. For the same purpose it has recourse to such positive measures as will secure immunity from acts of belligerency within its territory, and compel respect for its sovereignty and independence.[1]

History of Neutrality. The rules of neutral obligation are of relatively recent growth, and, in their present form, are largely the result of a compromise between the conflicting rights and interests of belligerents and neutrals. In ancient times the very conception of neutrality was impossible. So long as one powerful state aspired to or claimed universal dominion, it was impossible for other and less powerful states to maintain that separate, independent existence which is essential to the recognition of state rights, and so to the development of a true theory of neutrality. War, among the ancients, was the normal state of mankind, in which all nations participated, either as principals or allies. Had any ancient state attempted to occupy a position remotely resembling that of neutrality, according to the modern acceptation of the term, and had it attempted to compel respect to its neutral rights, the belligerent against whom the attempt was made would have regarded it as an act of war, and would have governed itself accordingly. This state of affairs continued until the modern idea of state sovereignty and territorial independence began to be generally recognized, towards the close of the Middle Ages.[2]

[1] "Neutrals in their own country may sell to belligerents whatever belligerents may choose to buy. The principal exceptions to this rule are that neutrals must not sell to one belligerent what they refuse to sell to the other, and must not furnish soldiers or sailors to either; nor prepare, or suffer to be prepared, within their territory, armed ships or military or naval expeditions against either. So, too, except goods contraband of war, or conveyed with intent to violate a blockade, neutrals may transport to belligerents whatever belligerents may agree to take. And so, again, neutrals may convey, in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery, at the port of destination and to become part of the common stock of the country or of the port."—The *Bermuda*, 3 Wallace, 514.

[2] Lawrence, Int. Law, § 244; Hosack, pp. 164, 165; IV Calvo, §§ 2495–2500; Heffter, § 152.

Development of the Neutral Theory among the Maritime States of Europe. In the history of neutrality a marked difference in development will be found to exist between the maritime and non-maritime states of the civilized world. This difference is due, in part, to the powerful influence exerted by commercial intercourse in the development of certain nations, and, in part, to the fact that the theory of neutral obligation found its first practical application in the shape of an immunity from capture accorded, in time of war, to the ships and goods of non-belligerents—or neutrals, as they would now be called—on the high seas. Indeed, the rules of neutrality on land, as will presently be seen, are of much more recent development, and did not come into existence until several centuries after the exemption of neutral goods from capture on the sea had received general international recognition. For this reason it will be proper to discuss, first, the development of the theory of neutrality among the maritime states of Europe.

The theory of neutrality is based upon, and deduced from, the conception of a number of sovereign states, or political communities, each enjoying a separate existence, and each recognizing the separate and independent existence of every other. Such conditions were fulfilled by the Mediterranean cities that participated in the revival of commerce towards the close of the Dark Ages; and it was among them that the modern theory of neutrality was developed. The first conception of neutral right to acquire general recognition among them seems to have consisted in the idea that, at the outbreak of war between any two cities, the commerce of the rest, who remained friendly to the belligerents, since it in no way concerned the hostile cities, should undergo the least possible interruption. Out of this immunity grew the idea of the exemption of neutral or friendly goods from capture in time of war.

These cities were either independent communities or were situated in separate states, and commercial relations had become so firmly established among them by the close of the eleventh century as to warrant the preparation of a code of

sea laws containing their common maritime usages. The earliest of these codes, the "Consolato del Mare," recognized the distinction between the property of friends and enemies in war, and declared that the former was exempt from capture and confiscation, even when found on an enemy's vessel. If such property were delivered at its destination, freight was due to the belligerent captor who effected the delivery. Similar provisions were contained in the later sea laws; indeed, so long as maritime commerce was controlled by the *cities* of southern and western Europe, the treatment of neutral property at sea was marked by extreme liberality.

The cities that were identified with the revival of commerce engaged in such pursuits for purely mercenary reasons. They were rivals in commerce only, and none of them aspired to territorial, as distinguished from commercial, dominion. Their commercial rivalry was keen, however, and some of them asserted claims to the exclusive control of certain waters for purposes of trade. Conflicts of interest thus arose, which at times resulted in war; but as their commercial interests were, on the whole, of the first importance, their relations were more generally peaceful than hostile. Upon the outbreak of war the greater number of cities found it to be to their interest to refrain from participation in its operations, and to continue their friendly relations with both belligerents. The relations of the non-belligerent, or neutral, cities with each other underwent no change. They were at peace, and simply maintained, without interruption, their ordinary commercial intercourse. As the greater number of these cities were usually at peace, it is easy to see that it was to the general interest that their commercial relations should suffer, during war, the least possible interruption. The necessity of combining to protect their merchant vessels from the depredations of pirates must have suggested to them, at a relatively early date, the desirability of similar concerted action to secure a like immunity from acts of belligerency, and to compel respect for their neutral rights.[1]

[1] Hall, pp. 576–579; IV Calvo, §§ 2495–2500; Lawrence, Int. Law, § 244; I Hautefeuille, pp. 195–239.

The Rule of the "Consolato del Mare." Out of this state of international relations grew the rule of the "Consolato del Mare," that enemy goods were liable to capture, and neutral goods were exempt from capture, wherever found. This rule was generally accepted by the commercial cities, and, later, by the European powers. With occasional interruptions, due in great part to treaty stipulations, it continued to be the most generally accepted rule upon the subject of the liability of property to capture at sea, until the adoption of the more liberal rule of the Declaration of Paris, in 1856.[1]

General Acceptance of the Rule. England adopted the rule at the organization of its admiralty courts during the reign of Edward III., and has consistently maintained it during her subsequent history. In a small number of treaties, made during the seventeenth and eighteenth centuries, the English Government conceded the principle that free ships make free goods; but these concessions were of a temporary character, and in nearly all cases were terminated by a positive disavowal of the milder rule. France, after observing the rule of the "Consolato" for nearly five hundred years, repudiated it in the Maritime Ordinances of 1681. By that instrument the rule of capture was stated to be that the goods of an enemy in a neutral vessel and the goods of a friend in an enemy's vessel were alike liable to capture, thus establishing the rule that enemy ships make enemy goods. This continued to be the practice of France, subject to some modification in her conventional law, until the Declaration of Paris. The practice of Spain, during the period of her maritime supremacy, was similarly severe.

Policy of the United States. The policy of the United States, as indicated in the decisions of the Supreme Court, has been substantially the same as that of England. "The two distinct propositions—1. That enemy's goods found on board a neutral ship may lawfully be seized as prize of war,

[1] Consolato del Mare, chap. 273, §§ 1–9; Manning, pp. 279–287; Hosack, pp. 164–167; Ortolan, liv. ii. pp. 96–103; IV Calvo, § 2495; Hefftter, § 152.

and, 2. That the goods of a neutral found on board of an enemy's vessel are to be restored—have also been explicitly incorporated into the jurisprudence of the United States, and declared by the Supreme Court to be founded on the law of nations. The rule, it was observed by the court, rested on the simple and intelligible principle that war gave a full right to capture the goods of an enemy, but gave no right to capture the goods of a friend. The neutral flag constituted no protection to enemy's property, and the belligerent flag communicated no hostile character to neutral property. The character of the property depended upon the fact of ownership, and not upon the character of the vehicle in which it was found. Nations, indeed, had changed this simple and natural principle of public law by conventions between themselves, in whole or in part, as they believed it to be for their interest; but the one proposition, that free ships should make free goods, did not necessarily imply the converse proposition, that enemy's ships should make enemy's goods. If a treaty established the one proposition, and was silent as to the other, the other stood precisely as if there had been no stipulation, and upon the ancient rule."[1]

The policy of the different departments of the United States Government upon the question of maritime capture has not been the same. The courts of the United States, being to some extent controlled by the English precedents in prize cases, have, in the main, followed the English rule, as expressed in the "Consolato del Mare."[2] The political departments, on the other hand, have constantly endeavored to secure the greatest possible immunity from capture for private property at sea, and to that end have endeavored to obtain, by treaty and otherwise, international consent, not only to the rule that free ships make free goods, but that *all* private property at sea, not contraband of war, should be exempt from capture and confiscation in time of war.[3]

[1] The *Nereide*, 9 Cranch, 388, 419; III Phillimore, pp. 317, 318; I Kent, pp. 124, 125.

[2] I Kent, pp. 127–135; Boyd's Wheaton, § 439i; II Halleck, pp. 308–312; IV Calvo, § 2495.

[3] President Pierce, Second Annual Message, 1854; Marcy to Baron

The Principle of Free Ships, Free Goods. The principle that *free ships make free goods* was first recognized by Holland during the early part of the seventeenth century, and was the result of the peculiar situation of that state as a European power. Its military strength on land was far less in amount than that of the great states by which it was surrounded, and was never more than sufficient to the task of securing its independent political existence. The contrary, however, was the case at sea, where the maritime power of the republic was exceeded, if at all, by that of England alone. The maintenance of its position as a maritime and commercial power thus became a matter of the first importance, and was so recognized by the succession of able statesmen who directed the state policy of the United Provinces during the seventeenth and eighteenth centuries. Having but little military strength, it was desirable that Holland should remain neutral in all European wars. It was still more desirable, however, that its immense carrying trade should be exempt from the effects of war at sea. But this exemption could only be obtained by securing the adoption of the rule that *free ships made free goods*, as the rule then prevailing was that of the "Consolato del Mare," by which the ownership of property determined its liability to capture.

For the adoption of a new rule on the subject of maritime capture the general consent of nations was necessary, and that consent could only be obtained by treaty stipulations. The efforts of the Dutch Government were therefore directed to that end, and, as a result, a number of treaties were negotiated in which the rule of *free ships, free goods*, was recognized, and the liability to capture was determined by the *nationality of the vessel*, and not by *the ownership of the goods*, as in the ancient rules. As Holland was more generally neutral than

Gerolt, Dec. 9, 1854; III Dig. Int. Law, § 385. The principle of free ships, free goods, was incorporated in the treaties between the United States and France in 1788 and 1800; with the United Provinces in 1782; with Sweden in 1783, 1816, and 1827; with Prussia in 1785 and 1828; with Spain in 1795.

belligerent, the adoption of the latter principle, in its fullest extent, would be, in the main, advantageous to her interests. She would gain more, as a neutral, by the adoption of the rule of *free ships, free goods*, than she would lose, as a belligerent, by the adoption of the rule of *enemy ships, enemy goods*. For this reason, in some of her treaties both of these principles were connected, and the liability of merchandise to capture on the high seas was determined by the nationality of the vessel, rather than by the ownership of the cargo.[1]

The principle of free ships, free goods, was accepted by many of the less important commercial states of Europe. It was generally accepted by the Baltic powers, by France, in the Treaty of Ryswick, in 1657, and even by England, in a few treaties negotiated between the years 1658 and 1756. From the year 1715 onward, the maritime importance of Holland steadily declined; and as that state was no longer directly interested in the maintenance of the new rule, the treaties upon which it had been based were not renewed, or were suffered to lapse, and it appeared less frequently in the new treaties which were negotiated, from time to time, upon the subject of maritime capture. From the Peace of Paris, in 1763, until the outbreak of the Crimean War, in 1853, the maritime preponderance of England was sufficient to prevent the general adoption of any principle of capture more liberal or less severe than that contained in the rule of the "Consolato del Mare," the justice of which the British Government had always maintained.

At the outbreak of the Crimean War the British Government announced that for the period of that war it would "waive the right of seizing enemy's property laden on board a neutral vessel unless it be contraband of war." A similar waiver was made by the French Government. In both cases the concession was declared to be due to a desire to render the war "as little onerous as possible to the powers with which they remained at peace."[2]

[1] For lists of these treaties see III Phillimore, pp. 324 *et seq.*

[2] Joint Declaration of March 28, 1854, made by England and France. See, also, Marcy to Crampton, Ortolan, liv. ii. pp. 464–466.

The Declaration of Paris. The Treaty of Paris, which terminated the Crimean War, was signed on March 30, 1856. The representatives of the powers that had been parties to the treaty, at the suggestion of Count Walewski, the French plenipotentiary, assembled in conference for the purpose of discussing the rules of maritime capture, and, on the 16th of April following, adopted a body of rules modifying the existing rules of capture, which has since been known as the Declaration of Paris. The rules adopted were four in number:

(*a.*) Privateering is, and remains, abolished.

(*b.*) The neutral flag covers enemy's goods, with the exception of contraband of war.

(*c.*) Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

(*d.*) Blockades, to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Declaration was signed by plenipotentiaries representing Great Britain, France, Russia, Austria, Sardinia, Prussia, and Turkey; and the signatory powers further agreed to bring the Declaration to the knowledge of the states which had not taken part in the Congress of Paris, and to invite them to accede to it. Between the years 1856 and 1861 the principles of the Declaration had been accepted by all the European powers except Spain, and by all those on the western continent except Mexico and the United States. The three powers which refused to adopt the proposed rules agreed in rejecting the rule abandoning the practice of privateering, and, as the Declaration had to be accepted as an entirety, these states were thus prevented from formally accepting the three rules to which they entertained no objection.[1]

When the Declaration of Paris was submitted to the government of the United States for adoption, it was replied, in behalf of that power, that, in their proposed form, the rules could not be accepted as a whole. The policy of the United

[1] III Dig. Int. Law, § 342, p. 273.

States had always been to maintain a small naval establishment, and its important commercial interests would not permit it to resign the right of increasing its power at sea, at the outbreak of war, by the acceptance into its naval service of a force of privateers. It was observed, however, that if a rule were added to the Declaration exempting all private property from capture at sea, in time of war, the necessity for the employment of such an additional force would disappear, and the United States would gladly accede to the proposed rules.[1] At the outbreak of the War of the Rebellion an attempt was made by the United States to become a party to the Declaration of Paris, but, as it was understood that its acceptance was to include the Confederate States as well, the attempt was not persisted in.[2]

Binding Force of the Declaration. The rules of the Declaration of Paris upon the subject of maritime capture, although binding upon the signatory powers alone, have been generally accepted as the rule of international law upon the subjects of which they treat, and it is highly improbable that a severer rule will be adopted at any time in the future. The adoption of a milder rule is as little probable. Upon several occasions it has been suggested to amend them, in the direction of greater liberality, by the adoption of a rule exempting all private property from capture at sea. These suggestions have not been favorably received by the great maritime powers, however, and there is no indication, at present, that the rules of the Declaration will be relaxed in such a way as to give to private property at sea any greater immunity from capture than it now enjoys.

At different times the justice of the rules of the Declaration of Paris has been discussed, especially in England, and the opinion has been advanced that that power had unwisely sur-

[1] III Dig. Int. Law, § 342, p. 274.

[2] III Dig. Int. Law, § 342, pp. 273–304. "The United States announced at the outbreak of the rebellion, in 1861, that it would observe the rules of the Declaration during the continuance of hostilities."—Hall, § 256; Dana's Wheaton, § 475, note 223.

rendered a valuable right, without receiving in return any corresponding advantage. It is difficult to see how this ground can be maintained. The loss of private property at sea, however great in amount, rarely affects, to any material extent, the military resources of a powerful belligerent, and so rarely contributes to bring to an end an existing war. It would be impossible to invent a more effective method of not only crippling but absolutely destroying the merchant marine of a state than was resorted to, with the most complete success, by the government of the Confederate States during the War of the Rebellion. But the destruction wrought by the Confederate cruisers in no material way impaired the military strength of the United States, or changed the result of the war in the slightest degree. If it were intended, by the destruction of vast amounts of private property, to affect the course of the Federal Government, that intention signally failed of execution. On the other hand, it is at least probable that the business revival of the Southern States has been, to an appreciable degree, injuriously affected by the change in carrying trade, which resulted from the destruction of the American merchant marine during the War of the Rebellion.[1] The position of England in this matter is still more difficult to understand. The English navy, efficient and powerful as it may be, is not omnipotent, and, as the experience of the United States has shown, the enormous commercial marine of England would, in the event of war, be liable to capture and destruction, as a result of the depredations of a relatively small number of fast-steaming cruisers, whose operations are more difficult to check than is generally supposed.[2] The power of a state to efficiently police the sea, and to protect its merchant marine, by preventing or punishing depredations against it, is largely overestimated. At no time in history has the supremacy of England at sea been more unquestioned than during the period of the Napoleonic wars, at the beginning

[1] III Phillimore, § 218; II Twiss, § 207.

[2] Hall, § 147; II Ferguson, pp. 308–326; Lawrence, §§ 216, 217.

of this century; and yet, on two conspicuous occasions, when the fullest warning of the enemy's purposes and intentions had been given, a hostile fleet was able, without particular or exceptional difficulty, to evade the whole maritime power of England.[1]

Claims to Exclusive Dominion, their Effect upon the Development of the Neutral Theory. As the assertion and enforcement of these claims have invariably had the effect of retarding the development of the true theory of neutral obligations, they will now be briefly discussed. If we examine the history of those cities and states which, at different times, have attained great maritime or commercial supremacy, it will be seen that they have always claimed exclusive commercial dominion over the seas and coasts with which they were the first to develop commercial intercourse. When the Greeks first began to interest themselves in foreign commerce they found the Phœnicians in possession of the most desirable coasts of the Mediterranean. They were, therefore, obliged to confine their commercial undertakings to new seas, or to parts of the Mediterranean which their rivals had not already appropriated. Neither of these people aspired to territorial, as distinguished from commercial, dominion. The possession of the sea-coast sufficed to secure the latter; with the former they had no concern. With the Romans the case was entirely different. They deemed mere commercial supremacy as of but slight importance, and claimed, and ultimately acquired, universal dominion. With the downfall of the Western Empire commerce greatly declined, and at times almost disappeared. With the revival of civilization, however, commercial intercourse was re-established, and was fostered and controlled by those cities of Italy and Spain which were the first to engage in maritime pursuits towards the close of the Dark Ages.

[1] "One of these occurred in 1796, when General Hoche succeeded in entering Bantry Bay, on the Irish coast; the other in 1798, when a formidable French fleet succeeded, during a period of more than six weeks, in evading a no less skilful naval commander than Lord Nelson."—Thiers, French Revolution, vol. iv. pp. 67, 260 *et seq.*

These cities soon claimed exclusive dominion over certain waters for purposes of trade, and forbade all commerce with such coasts to the ships of other cities. Their right to such exclusive intercourse was denied, and numerous wars were undertaken, some in support of, and others in opposition to, these claims.

Venice was the first of the Mediterranean cities to attain to any considerable degree of commercial supremacy, and, so early as the twelfth century, asserted a right to the exclusive navigation of the Adriatic. This claim was sanctioned by Pope Alexander III., in 1177,[1] and was long maintained against all opposition. At a later period similar claims were advanced by Genoa and Pisa. The discovery of the sea route to India by Portugal, and of the western continent by Spain, largely reduced, and eventually destroyed, the commercial importance of the Mediterranean cities, and transferred the sovereignty of the seas to the two latter powers, by whom, in turn, the most extravagant claims were asserted to maritime dominion. As the claims brought forward by Spain and Portugal were in some degree conflicting, they were submitted to the pope, Alexander VII., who, in 1493, established, as a boundary between them, a meridian line passing through a point 100 leagues west of the Azores Islands.[2] All of the earth's surface east of that line which formed no part of the dominions of any Christian prince was declared to belong to Portugal; while all to the west of the same line was, subject to a similar restriction, decreed to Spain. Claims somewhat similar in character were advanced, at a later period, by England and Holland, only to encounter the most serious and obstinate resistance, which resulted in their final abandonment. The last instance of such a claim being advanced to any considerable portion of the high seas was that of Russia, who asserted the right of exclusive navigation of that part of the Pacific lying north of the fifty-fourth degree of north latitude, on the ground

[1] Azuni, vol. i. p. 78; IV Calvo, §§ 2495–2499; Hall, § 208.

[2] Azuni, vol. i. p. 106. See, also, pp. 13, 14, *ante*.

that it possessed the coasts of both continents above that line. This claim, however, was relinquished upon the representations of England and the United States, and has never been reasserted.[1]

If the claims which have been made, at different times, to exclusive maritime dominion be examined, it will be found that each of them is susceptible of being resolved into two parts:

(*a.*) A claim to a kind of territorial sovereignty over a portion of the high seas, with the adjacent coasts.

(*b.*) A claim to the right of exclusive commercial intercourse with the territories whose coasts were washed by the waters over which jurisdiction was asserted.

The first of these claims has been vigorously opposed since the middle of the seventeenth century, and with such success that all such claims have long since been abandoned, never to be reasserted.

The second continued to exist, and was long recognized as just and equitable. As new territories were acquired by different European powers, either by colonization or by conquest, the exclusive privilege of trading with them was claimed by the parent or conquering state, and, tacitly or expressly, recognized by other states of the civilized world.[2]

The Monopoly of Colonial Trade. Although the claim of a parent state to a practical monopoly of colonial trade was finally recognized, such recognition was not conceded without opposition, nor was the colonial monopoly itself a source of unmixed benefit to the state enjoying it. In time of peace it was a fruitful source of revenue, and afforded a favorable market for the productions of the mother country. In the event of war, however, if the parent state occupied the position of a belligerent, its vessels engaged in the colonial trade became liable to capture and confiscation, and it was impossible to measure the resulting loss by the money value of the ships

[1] See Treaties and Conventions of the U. S. with Foreign Powers (Washington, 1889), pp. 931–933.

[2] IV Calvo, §§ 2494–2499; Hall, § 208; II Twiss, §§ 208–210.

and cargoes which were captured by the enemy. A large part of the belligerent's commerce was destroyed, or diverted to other channels, and was but slowly revived after the peace. To obviate this attempts were made, at times, by several European states, to transfer their colonial trade to a neutral flag during the period of hostilities. As this course deprived a belligerent of the right to injure his enemy, by a resort to one of the most powerful means of coercion then recognized by the laws of war, such transfers of trade were stoutly resisted, chiefly by the British Government, whose maritime preponderance had become so firmly established by the middle of the eighteenth century as to enable it to enforce respect, in so far as its own interests were concerned, to whatever views of maritime warfare were deemed by it to be correct and in accordance with international law.

The Rule of 1756. The practice contended for by Great Britain, that a belligerent could not transfer his colonial trade to a neutral during an existing war, and that neutral merchant vessels engaged in such trade acquired a hostile character by so doing, and were thus made liable to capture and condemnation, has become known to publicists as the Rule of 1756.[1] The view thus advanced by Great Britain was extended to all colonial trade with neutrals in 1793, by the attempted enforcement of a rule that the colonial trade of a belligerent, which that belligerent had undertaken to throw open to all nations without reserve by a general and, on its face, permanent regulation, could not be participated in by neutrals, and that neutral ships engaged in such trade would become liable to capture as ships of the enemy. This is known as the Rule of 1793, and its enforcement was immediately opposed by France and Spain, and, at a later period, by the United States. A principle or rule, asserted, or even enforced, by one powerful state, is not a rule of international law; to become such it must

[1] II Halleck, pp. 325–330; III Phillimore, §§ 221–223; Boyd's Wheaton, § 508; the *Princesa*, 2 C. Rob. 52; the *Emanuel*, Ibid. 186; the *Anna Katherina*, 4 Ibid. 118; the *Rendsburg*, Ibid. 121; the *Vrow Anna Katherina*, 5 Ibid. 161.

receive the sanction of all, or nearly all, of the civilized states of the world. The principle underlying the Rule of 1756 is now accepted, as applying to coasting trade, by the principal maritime powers. But the Rule of 1793 has received no such general sanction, and its enforcement, if persisted in, would have given rise to most serious complications. Its severity, however, was relaxed as practical free trade was gradually conceded to colonies, largely upon their demand to enter the markets of the world upon equal terms with the mother countries.[1]

Development of the Theory of Neutrality among the Non-Maritime States of Europe. The power and importance of the Mediterranean cities were entirely maritime, and were due to the energy and industry with which they prosecuted their commercial undertakings. They had but little power on land; they rarely asserted claims to territorial supremacy, and so were rarely engaged in wars, other than those caused by their conflicting commercial interests. It was for this reason that they progressed but little, in their development of the theory of neutrality, beyond the establishment of the rules regulating the subject of maritime capture. The relations of the great European states, which were gradually acquiring something of their present territorial form, were not such as to favor the development of any consistent or enduring theory of neutral obligation. Their relations were more generally hostile than peaceful; private and dynastic wars were common, and the brief periods during which hostilities were interrupted or suspended were usually devoted to the preparation of new schemes of conquest or dominion. Some progress must have been made, however, as the necessities of the great powers made peace occasionally desirable. But it was impossible for the conception of neutrality to obtain general recognition until the desire of the powers to remain at peace had acquired sufficient strength to become at least equal to the desire for war and conquest. In the absence of positive evidence, it

[1] II Halleck, pp. 330–339; I Life and Letters of Joseph Story, p. 287; 4 Rob. Adm. Rep. App. A.

is fair to presume that the rudiments of the theory were first recognized by those states which became neutral by reason of their distance from the theatre of war, and from a consequent lack of direct interest in the war or its results. When the principle of the balance of power first began to be understood, it seems to have been regarded as possible to maintain it in no other way than by waging war against the state, or states, which threatened it. Indeed, it was not merely threatened, it was repeatedly attacked, and was in constant danger of overthrow, which could be effectively prevented only by force of arms. This state of affairs contributed powerfully to retard the growth of the theory of neutrality, since every important state in Europe was obliged to take part, as principal or ally, in the numerous wars which were undertaken whenever the equilibrium was disturbed.[1]

Influence of England upon the Development of the Modern Theory of Neutrality. The insular situation of England, so placed as to be secure from attack except by sea, enabled, and to some extent constrained, that power to adopt a policy of partial abstinence from interference in Continental affairs, and to decline taking part in Continental wars in which it had no important interests at stake. Not only was England able to decline participation in such wars, thus placing her in a position of practical neutrality, but her power on land and sea was so great as to enable her to insist upon her neutrality being respected by belligerents. She thus became, to a certain extent, an advocate of neutrality, and an example to other powers of the advantage of remaining neutral.[2]

General Acceptance of the Modern Theory in the Seventeenth Century: its Later History. Although its progress had been extremely slow, the principle of neutrality had received such general recognition by the middle of the seventeenth century as to lead Grotius to devote a portion of his work to a discussion of the rights and duties of neutrals.

[1] Hall, §§ 209, 210; II Ferguson, pp. 511–515; IV Calvo, §§ 2495–2538; Lawrence, § 244.

[2] IV Calvo, §§ 2499, 2500; Hall, §§ 208–217.

From that time its progress was more rapid. The Treaty of Westphalia largely diminished the power and influence of the pope in secular affairs, and enabled the intercourse of the European states to assume a more normal character. Wars became less frequent, and were more closely restricted in their operations and effects to the states which were immediately concerned in them. The states which chose to occupy the position of neutrals at the outbreak of war steadily increased in number, and were led to insist more strongly upon their rights being respected by belligerents.

It was during this period that the Dutch became interested in the amelioration of the rules of maritime capture. Their efforts were not permanently successful, however, and, as their influence declined, that of the United States began to be put forth in advocacy of the same cause. Their independence had no sooner been recognized than they began to assume importance as a commercial power. The tendencies of the new state were altogether peaceful. Its distance from Europe, not less than its peculiar governmental institutions, secured it an almost complete immunity from interference in European affairs, and enabled its people to devote their energies to projects of internal development and to the extension of their already important commercial relations. The foreign policy of the United States was, from the first, one of strict non-participation in questions of strictly European concern. Every consideration, therefore, of material interest and territorial position induced the new republic to occupy an attitude of neutrality in all wars of European origin. The justice and advantage of this policy were fully appreciated by those who directed its foreign affairs, and so thoroughly were the principles of neutral obligation understood by them that the early proclamations of neutrality issued by the United States not only served to establish the permanent neutral policy of that power, but were soon generally accepted as furnishing an enduring standard of neutral right and duty.[1]

[1] Creasy, p. 572; I Phillimore, pp. 54–60; IV Calvo, §§ 2495–2543.

Forms of Neutral Obligation

Gradations of Neutrality. The crude and imperfect views of neutral duty which formerly prevailed admitted of gradations, or degrees, of neutral obligation. These were, in substance, violations of neutrality, and, as such, are no longer sanctioned by the practice of nations. Such was the qualified neutrality of certain European states during the last century, by which the obligation to remain neutral was qualified by a previous treaty with one of the belligerents, stipulating to furnish him with certain aid in men, money, or war material in the event of a particular war, or upon the occurrence of hostilities of any kind with any state. Such action would not now be tolerated; and a state entering into such treaty engagements would be regarded as an ally of the enemy so soon as it undertook to carry into effect its treaty stipulations.[1]

Permanent Neutrality. The status of permanent neutrality occupied by Switzerland and Belgium is in no way repugnant to international law. The exceptional circumstances in each case are to some extent based upon the size and territorial position of these states, upon their inferior military power as compared with the great states by which they are surrounded, and to a certain extent, also, upon considerations having to do with the preservation of the European balance of power.[2]

Armed Neutrality. An armed neutrality is, in fact, an alliance of several powers, usually of a defensive character, though this is by no means essential. The purpose of such an alliance is to secure the maintenance of certain views of neutral right which are believed to be in danger or whose justice is likely to be questioned. The most striking historical examples of such alliances are those of the armed neutralities, of the northern European powers, of 1780 and 1800. These alliances were

[1] II Halleck, pp. 174, 175; Creasy, pp. 576, 577; Boyd's Wheaton, §§ 415–422; Woolsey, § 163; Manning, pp. 223–238; I Kent, pp. 116, 117; IV Calvo, §§ 2594, 2595.

[2] Creasy, pp. 575, 576; Boyd's Wheaton, § 423; Woolsey, § 163; IV Calvo, §§ 2596–2611.

made to defend the principle of free ships, free goods, which had been adopted by treaties between the Baltic powers, and which was opposed by England, that power being, on both occasions, a belligerent. Although the purpose of the alliance was not effected on either occasion, the agitation of the question continued, and without doubt contributed materially to bring about the adoption of the Declaration of Paris. If the commercial interests of several nations are threatened by unjust or unlawful measures, on the part of a belligerent, which they deem unjust or dangerous, there can be no question of their right to secure their menaced interests by such combinations as seem best calculated to accomplish the purpose.[1]

Strict Neutrality. As at present understood, a state, in becoming neutral, occupies a position of strict neutrality. It rigidly abstains from aiding either belligerent, or from rendering to either of them any service, however slight or immaterial, which is calculated to assist him in his military operations. The friendly relations existing at the outbreak of the war are not interrupted, and it is to secure the continuance of such relations that a neutral state becomes charged with certain duties during war which do not exist during peace. These obligations are the measure of a neutral's duty in war. They are determined by international law, and have the same binding force upon all states. A failure in the performance of these duties is an injury to the particular belligerent who suffers by the failure of a neutral state to fulfil its obligations. These obligations have to do in part with the conduct of the neutral state in its capacity as a body corporate, and in part with the conduct of persons within its jurisdiction.[2]

Neutral Duty of a State. In the general discussion of the neutral relation, it is proper to observe at this point that a distinction is made between the acts of a state, in violation of

[1] II Twiss, pp. 158, 197, 268; Hall, pp. 652, 655, 692, 707, note; III Phillimore, pp. 335–352; Boyd's Wheaton, §§ 450, 453, 527; IV Calvo, §§ 2638.

[2] III Phillimore, p. 226; Walker, Manual, §§ 54–58; Vattel, liv. iii. chap. vii. § 104; Boyd's Wheaton, §§ 435–439; I Kent, pp. 116, 117; Woolsey, §§ 164, 165.

its neutrality, and the acts of its citizens or subjects in their relations with the governments of the belligerent powers.[1] A state, in its corporate capacity, is not permitted to give any material aid to either belligerent, or to furnish money, ships, troops, subsistence, or munitions of war, or to render any assistance which is likely to be useful to such belligerent in his military operations. A neutral state, therefore, cannot permit its ports or territorial waters to be used as a base of hostile operations, or as depots of supply of articles susceptible of warlike use. It is forbidden to allow the enlistment of men, or the organization or equipment, wholly or in part, of hostile expeditions, by sea or land, within its territorial limits.[2]

Some of these acts being, in substance, acts of sovereignty, are forbidden alike in peace and war. Others are permitted in peace, but are forbidden in time of war. The principle underlying the latter class is this: Any substantial aid or service which contributes to the success of the military operations of one belligerent enables him to inflict an injury upon his enemy with whom the neutral is at peace. The neutral state, therefore, in a more or less direct manner, has injured, or contributed to injure, a friend. As every state is the exclusive judge as to what injuries it shall regard as furnishing just cause for war, a neutral state may in this way, by a single act of service, become a party to an existing war. It is easy to see, therefore, that if it were permitted to render such services with impunity, every important war would, sooner or later, involve all neutral states in its operations, and so one of the chief purposes of international law would fail of attainment. War would again become the rule, as in ancient times, and for much the same reason. Permanent peace would be impossible, and the relations of states would be subjected to a constant strain which would seriously affect their prosperity and material development. The principal of the measures of prevention to which states are compelled to resort

[1] Creasy, pp. 590–595.

[2] III Phillimore, pp. 226–242; II Halleck, p. 305; Hall, pp. 80–86; IV Calvo, § 2593; Vattel, liv. iii. chap. vii. §§ 104, 118.

in order to secure the observation of neutrality will be discussed.

(1.) **Enlistment of Troops in Neutral Territory.** It has been seen from the definition of citizenship and the discussion of the forces that may be employed in war that the armies of a belligerent are, or should be, in great part composed of his own citizens or subjects. The attempt, therefore, to create a military force by the enlistment of troops in neutral states, always regarded with suspicion, is now generally looked upon as a serious violation of the rules of international law. The territory and waters of a neutral state are sacred and inviolable because they are neutral and pertain to a state which refrains from rendering assistance to either belligerent at the expense of the other. When, therefore, the territory of a neutral is used by one belligerent as a recruiting-ground to the disadvantage of the other, there is a violation of the neutral obligation, and such territory ceases to be neutral and becomes to that extent the territory of the enemy.[1]

The practice of furnishing troops or permitting their enlistment in neutral territory was more common in former times than it is at present. During the Middle Ages, "companies," as they were called, of freebooters were formed under some adventurous captain, and sold their services, without regard to the cause, to any belligerent who paid for them—not infrequently to both sides in succession during the continuance of the same war. At a later period, not only did the English troops serve against the Spaniards during the revolt of the Netherlands, but six thousand Scotchmen fought under the standard of the Marquis of Hamilton in the Thirty Years' War, in Germany, in which contest England was a neutral.[2]

[1] Hall, § 218; I Kent, pp. 117–124; Manning, pp. 224–240; III Phillimore, pp. 233–237; Creasy, pp. 587–589; Boyd's Wheaton, § 436; II Halleck, pp. 184–195; Vattel, liv. iii. chap. ii. § 15; Risley, pp. 191, 192; the *Gran Para*, 7 Wheaton, 471; II Twiss, § 224; IV Calvo, §§ 2619–2623.

[2] The furnishing of troops by a neutral to a belligerent was, in former times, held to be justified by the stipulations of a treaty, made in time of peace, but with a view

Still later England procured the services of German mercenaries, who were employed in America during the war of the Revolution.

These practices, which have long been disfavored, are now strictly forbidden as a flagrant violation of its neutrality on the part of the state which permits them. With a view to make such prohibition effective, the act of enlisting troops for service in the armies of a belligerent is now made the subject of prohibitory legislation. The neutrality laws of England and the United States, for example, forbid, under severe penalties, the enlistment of soldiers or sailors within their territories, by the agents of one belligerent, for service in its land or naval forces against the other, or against a power with which the neutral is at peace.[1]

to the eventuality of war. The troops so furnished in pursuance with the terms of a treaty were regarded as enemies, but not the state which furnished them. The execution of such a treaty, at the present time, would operate, at the outbreak of war, to convert the states which were parties to it into allies, and would deprive the state furnishing the troops of its character as a neutral from the date upon which the stipulated assistance was furnished.—III Phillimore, pp. 233, 234; Manning, pp. 227–237; Vattel, liv. iii. chap. vii. § 110.

[1] The law of the United States on the subject of foreign enlistments will be found in §§ 5281 and 5282 of the Revised Statutes: "Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars, and imprisoned not more than three years."[a]—§ 5281 Rev. Stat. (Act of April 20, 1818, 3 Stat. at Large, p. 447). "Every person who, within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, shall be deemed guilty of high misdemeanor, and shall be fined not more than one thousand dollars, and imprisoned not more than three years."[b]—§ 2 Ibid. (§ 5282

[a] "The act of April 30, 1818, like that of June 5, 1794, was intended to secure, beyond all risk of violation, the neutrality and pacific policy which they consecrate as our fundamental law."—III Opin. Att.-Gen. p. 741.

[b] "The enlistment of seamen or others

The purpose of such legislation as that above described is to prevent organized efforts to secure the enlistment of troops, by belligerent agents, in neutral territory. Neutral governments, however, are not held responsible for the unorganized and unauthorized departure of individual citizens with intent to serve in the armies of a particular belligerent.[1]

The individual citizen, by so doing, forfeits, while in such bel-

Rev. Stat.). For English statutes on the same subject, see 3 James I. chap. iv.; 9 George II. chap. xxx.; 29 George II. chap. xvii.; 59 George III. chap. lxix. (1819); 33 and 34 Vict. chap. xc. "Some other states rely upon a general prohibition to their subjects, and an intimation that, by disobedience, they will forfeit all right and title to the protection of their government as against the measures of reprisal against them which a foreign state may take. Some others rely upon the general terms of their municipal laws being so interpreted, in their application to a particular case, by courts of justice, as to punish such offenders, usually on the ground that their conduct tends to embroil the relations and increase the obligations of their government towards the foreign state, the enemy of the assisted belligerent."—III Phillimore, pp. 277–285; Report of Neutality Laws Commissioners (Eng.), 1868.

for marine service on Mexican steamers in New York, they not being Mexicans transiently within the United States, is a clear violation of this section, and the persons enlisted, as well as the officers enlisting them, are liable to the penalties thereby incurred."—IV Ibid. p. 336. "This section applies to foreign consuls raising troops in the United States for the military service of Great Britain." —VII Ibid. p. 367. "It does not apply to those who go abroad for foreign enlistment, or to those who transport such persons."—U.S. *vs.* Kazinski, 2 Sprague, 7. "The enlistment must be made within the territory of the United States, and the section does not apply to one who goes abroad with intent there to enlist." —Ibid. "The words 'soldier' and 'enlist' as used in this section are to be understood in their technical sense." —Ibid.

[1] *Henfield's Case.* Henfield was a sailor, of American citizenship, who shipped in the French privateer *Citizen Genet*, at Charleston, S. C., while France was at war with England, and was indicted at common law for enlisting in violation of the treaties of the United States. The judges ruled that the act charged was a crime. In defence, however, it was shown that Henfield enlisted before the proclamation, in ignorance of the law, and, when told of its illegality, had expressed his regret. He was acquitted by the jury. This trial was promoted by the administration of Washington with earnestness, Hamilton lending his aid out of court. It was regarded as important, chiefly because M. Genet undertook to protect Henfield from trial, and to deny that his act was an indictable offence.—Wharton's State Trials (U. S.), p. 48, cited in Dana's Wheaton, § 439, note 215. See, also, U. S. For. Rel. 1885, p. 160.

ligerent service, the privileges of his local citizenship and the protection of his native government.[1]

Responsibility of a Neutral State for the Acts of its Subjects. A different rule applies to the conduct of the subjects of a neutral state than is applied to the neutral state itself, in its relations with the belligerents. It has been seen that the restrictions to which neutral states are subject are such as will prevent them from aiding either belligerent in his military operations, and, at the same time, be the smallest possible consistent with the purpose of the war. The subjects of a neutral state are engaged in many different occupations at the outbreak of hostilities. Most of these are in no way affected by the existence or non-existence of war. Some neutral subjects, however, are engaged in the manufacture, production, or distribution of certain articles, intended primarily for warlike uses, which become contraband, and so liable to capture and condemnation by a belligerent, if found at sea *en route* to a hostile destination. Others are engaged in trade with certain ports; with such ports a belligerent, by an exercise of the right of blockade, may absolutely prohibit commercial intercourse. In all other respects their undertakings are innocent, and are not interrupted or affected by the fact of war. The manufacture of contraband articles, and even their sale, in neutral jurisdiction, continues to be an innocent and lawful occupation. The neutral state itself ought not to be expected to interfere with the pursuits of its subjects, so long as they are not likely to compromise the position of neutrality which it assumed at the outbreak of the war. The powers placed in the hands of the belligerents to blockade the ports of an enemy, to search neutral vessels on the high seas, and to seize and condemn such portions of their cargoes as are contraband of war, or are destined to a blockaded port, are ample to protect them from being injured by the acts of individuals. If they

[1] Boyd's Wheaton, § 439; Creasy, p. 600; U. S. *vs.* Kazinski, 2 Sprague, 7; 8 Law Rep. 254; VII Opin. Att.-Gen. p. 367; Wharton's Criminal Law, pp. 905–910; Hall, pp. 600, 601; Risley, pp. 191–193 III Dig. Int. Law, §§ 390–395.

do not or cannot make their powers effective, they cannot, of right, expect neutral states to assist them in their endeavors. Nor can they expect neutrals to resort to severe police measures against their own subjects in a matter with which they have no direct concern.[1]

Views of England and the United States. The principle involved was well stated by Mr. Webster in his reply to the Mexican Government, which had complained of certain alleged violations of neutrality, on the part of individuals, in the supply of arms to Texas, then at war with Mexico. "It is not the practice of nations to prohibit their own subjects by previous laws, from trafficking in articles contraband of war. Such trade is carried on at the risk of those engaged in it, under the liabilities and penalties prescribed by the law of nations or particular treaties. If it be true, therefore, that citizens of the United States have been engaged in a commerce by which Texas, an enemy of Mexico, has been supplied with arms and munitions of war, the government of the United States, nevertheless, was not bound to prevent it; could not have prevented it, without a manifest departure from the principles of neutrality, and is in no way answerable for the consequences. . . . The eighteenth article (of the treaty between the United States and Mexico) enumerates those commodities which shall be regarded as contraband of war; but neither that

[1] "Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings—the only means, perhaps, of their subsistence—because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement of their occupations. It is satisfied with the external penalty pronounced in the President's proclamation — that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on their way to the ports of their enemies."—Jefferson to British Minister, May 15, 1793, III Jefferson's Works, pp. 558–560, I Amer. State Pap. (For. Rel.), pp. 69, 147; Treasury Circular, August 4, 1793, I Amer. State Pap. (For. Rel.), p. 140; Pickering to French Minister, May 15, 1796, I Amer. State Pap. (For. Rel.), p. 649; III Dig. Int. Law, § 391; Hall, § 218; II Twiss, § 232.

article nor any other imposes on either nation any duty of preventing, by previous regulation, commerce in such articles. Such commerce is left to its ordinary fate, according to the law of nations."[1]

Mr. Layard, the solicitor-general of the British Government, in a speech in the House of Commons, adopted the view above stated, and added, "The only law which enables her Majesty's Government to interfere in such cases is called the Foreign Enlistment Act, and the whole nature and scope of that act is sufficiently and shortly set out in its title. It is 'An act to prevent the enlisting and engagement of her Majesty's subjects to serve in a foreign service, and the fitting-out or equipping in her Majesty's dominions of vessels for warlike purposes, without her Majesty's license.' That act does not touch, in any way whatever, private vessels which may carry cargoes, contraband or not contraband, between this country and any port in a belligerent country, whether under blockade or not; and the government of this country, and the governments of our colonial possessions, have no power whatever to interfere with private vessels under such circumstances.

"It is perfectly true that in the Queen's proclamation there is a general warning at the end, addressed to all the Queen's subjects, that they are not, either in violation of their duty to the Queen, as subjects of a neutral sovereign, or in violation or contravention of the law of nations, to do various things, one of which is carrying articles considered and deemed to be contraband of war, according to law or the modern usages of nations, for the use or service of either of the contending parties. That warning is addressed to them to apprise them that if they do these things they will have to undergo the penal consequences by the statute, or by the law of nations, in that behalf imposed or denounced. In those cases in which the statute is silent the government is powerless, and the law of nations comes in.

[1] Lawrence's Wheaton, p. 813, note, citing Webster's Works, vol. vi. p. 452, Letter of Webster to Thompson, July 8, 1842; III Dig. Int. Law, § 391.

"The law of nations exposes such persons to have their ships seized and their goods taken and subjected to confiscation, and it further deprives them of the right to look to the government of their own country for protection. And this principle of non-interference in things which the law does not enable the government to deal with, so far from being a violation of the duty of neutrality—which the government is anxious to comply with—is in accordance with all the principles which have been laid down by jurists, and more especially by the great jurists of the United States."[1]

Continental View upon the Subject of Governmental Control of the Acts of Individuals. The views above expressed are those which have long been held upon this subject in England and the United States. Most Continental writers are at variance with this, and contend that more or less of direct governmental interference is necessary. This difference of view arises from the fact that the governments of nearly all the Continental states of Europe are highly centralized in character, and all commercial undertakings are therefore subject to a more or less complete governmental supervision and control. This is the case in time of peace, and is an incident of internal administration. In time of war it is extremely easy for any of these governments to regulate, or even to effectually prohibit, contraband trade on the part of its subjects, if it is deemed desirable to do so as a matter of state policy. In England and the United States no such supervision exists in time of peace; and it could be established, in time of war, only as the result of legislation to that effect, and could be maintained only at considerable expense and at the constant risk of violating some of the existing guarantees of individual right.[2]

[1] Lawrence's Wheaton, pp. 813, 814, citing remarks of Solicitor-General Layard in the House of Commons, February 22, 1862. See, also, Annual Message of President Pierce, 1854, Executive Documents of the United States, 1854–1855; II Twiss, § 226; Vattel, liv. iii. chap. vii. § 110; Hall, § 232; the *Santissima Trinidad*, 7 Wheaton, 283; Creasy, §§ 552–558; Manning, pp. 255–259; III Phillimore, pp. 387–390.

[2] IV Calvo, §§ 2617, 2633–2635.

(2.) **Fitting-out of Hostile Expeditions in Neutral Territory.** It has been seen that a belligerent has a right to expect that the armies of his enemy shall be composed of citizens of the state with which he is at war, and that he has a just ground of complaint if his enemy is permitted to recruit his armies in neutral territory. For precisely the same reason he has a right to expect that all expeditions and other warlike operations shall originate in the territory of his enemy, or in territory which, for the time, is securely occupied by that enemy. The rules of international law authorize him to so conduct his military and naval operations as to meet and oppose and, to a certain extent, to anticipate military undertakings on the part of his enemy; but he has no such right as against a neutral; nor, from the principle of state sovereignty and independence, has he authority to enter upon neutral territory with a view to prevent the organization or departure of expeditions which are being prepared within such territory with intent to operate against him on the high seas or elsewhere. If, therefore, an expedition, or other warlike operation, which is directed against him originates in the territory of a neutral, such undertaking being an operation of war, he is at liberty to regard that neutral as an enemy, and is warranted by the rules of international law in holding him responsible for a violation of his neutral obligation.

What Constitutes a Hostile Expedition—the Intent. In determining the duty of a neutral state in respect to permitting the fitting-out of hostile expeditions within its territories, the question of intent must be considered. If, for example, a vessel is constructed within neutral jurisdiction, purely as a commercial venture, and held for sale within neutral territory, or sent, under the papers and flag of such neutral state, to the port of a belligerent for sale with a crew sufficient only to navigate the ship and without capacity to resist search or capture, there is no violation of international law. If, on the other hand, the vessel is intended for belligerent use, and is constructed in neutral territory, but with a view to its becoming a part of the naval force of a belligerent on leaving such

neutral port, then it becomes a hostile expedition which it is the duty of the neutral state to prevent.[1] In this case it does not matter as to the state of completion in which the expedition may be when it leaves the waters of the neutral state; it is equally unlawful whether it be fully equipped for service, or whether it goes out in separate parts which are to be assembled on the high seas or in the waters of a neutral state. The offence is the same in either case.[2]

[1] "It is firmly settled that, if captures are made by vessels which have violated our neutrality laws, the property may be restored if brought within our territory."—The *Gran Para*, 7 Wheaton, 471; the *Santa Maria*, 7 Wheaton, 490; the *Monte Allegre*, 7 Wheaton, 520. "This court has never decided that the offence (of fitting-out, etc., in violation of the neutrality acts) adheres to the vessel, whatever changes may have taken place, and cannot be deposited at the termination of the cruise in preparing for which it was committed; and, as the *Irresistible* made no prize on her passage from Baltimore to the river La Plata, it is contended that her offence was deposited there, and that the court cannot connect her subsequent cruise with the transactions of Baltimore."—The *Gran Para*, 7 Wheaton, 471 [487]. "If this were to be admitted in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as this enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted in our ports for military operations need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crews to become perfectly legitimate cruisers, purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired. This would, indeed, be a fraudulent neutrality, disgraceful to our own government, and of which no nation would be the dupe. It is impossible for a moment to disguise the facts, that the arms and ammunition taken on board the *Irresistible* at Baltimore were taken for the purpose of being used on a cruise, and that the men there enlisted, though engaged, in form, as for a commercial voyage, were not so engaged in fact. There was no commercial voyage, and no individual of the crew could believe that there was one."—Ibid. See, also, II Halleck, pp. 196–199; II Twiss, §§ 232–240; IV Calvo, §§ 2517–2522; III Dig. Int. Law, §§ 395a–402.

[2] The rule above stated, which is supported by American authors and by some Continental writers, will be found fully set forth in the case of the *Santissima Trinidad* (7 Wheaton, 283) and in the following note to Dana's edition of Wheaton: "As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts were done. If any person does any act, or attempts to do any act, towards such

Duty of Neutral State, How Determined. The duty and responsibility of a state in this regard are fixed and determined, not by municipal, but by international law, which requires a

preparation, with the intent that the vessel shall be employed in hostile operations, he is guilty, without reference to the completion of the preparations or the extent to which they may have gone, and although his attempt may have resulted in no definite progress towards the completion of his preparations. The procuring of materials to be used knowingly and with the intent, etc., is an offence. Accordingly, it is not necessary to show that the vessel was armed or was in any way or at any time before or after the act charged in a condition to commit acts of hostility. . . . It will be seen at once, by these abstract definitions, that our rules do not interfere with *bona fide* commercial dealings in contraband of war. An American merchant may build and fully arm a vessel and supply her with stores and offer her for sale in our own market. If he does any acts as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our own law, send out such a vessel so equipped under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chance of capture as contraband merchandise of blockade and of a market in a belligerent port. In such case the extent and character of the equipments are as immaterial as in the other class of cases. The intent is all. The act is open to suspicion and abuse, and the line may often be scarcely traceable, yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise to be sent to the market of a belligerent, subject to the chances of capture and a market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise, immediately or ultimately, against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent. In the former case the ship is merchandise, under *bona fide* neutral flag and papers, with a port of destination, subject to capture as contraband merchandise by the other belligerent, to the risks of blockade, and with no right to resist search and seizure, and liable to be treated as a pirate by any nation if she does any act of hostility to the property of a belligerent, as much as if she did it to that of a neutral. Such a trade in contraband a belligerent may cut off by cruising the seas and blockading his enemy's ports. But to protect himself against vessels sailing out of a neutral port to commit hostilities, it would be necessary for him to hover off the ports of a neutral; and to do that effectually he must maintain a kind of blockade of the neutral coast, which, as neutrals will not permit, they ought not to give occasion for."—Dana's Wheaton, 8th edition, note 215. See, also, the *Santissima Trinidad*, 7 Wheaton, 283. "Where a person was indicted under the third section of the act of 1818 (3 Stat. 448; Rev. Stat. § 5283) with being knowingly concerned in the fitting-out of a vessel with intent to employ her in the service of a foreign people, viz.,

neutral state to prevent the departure of such hostile expeditions. It may resort to such measures of prevention, in respect to its subjects or other persons within its jurisdiction, as it may deem prudent or expedient to accomplish that purpose; it may enact stringent laws, or it may issue proclamations or promulgate regulations; with all this international law has nothing to do. Such statutes neither add to nor diminish the responsibility of the neutral state, which must see to it that such expeditions do not emerge from its territorial waters with a view to commit acts of hostility against a state with which the neutral is at peace. Their existence presumes an intention on the part of a state to fulfil its neutral duties. Their absence may imply the contrary, or it may imply that some department of the government has sufficient power in the premises to make such provisions unnecessary. If they exist, and are inadequate to the purpose, their inadequacy cannot be pleaded in extenuation of a violation of neutral duty; if they do not exist, their absence cannot be alleged to excuse a failure to observe a neutral obligation; nor, finally, can their enforcement, by obscuring the real issue involved, or by distracting the attention of a neutral state from its real responsibility, at all diminish that responsibility or change its character.[1]

Augmentation of Force. What has been said in respect

the United Provinces of Buenos Ayres, against the subjects of the Emperor of Brazil, with whom the United States are at peace: Held, that to bring the defendant within the act, either fitting-out or arming will constitute an offence."—United States *vs.* Quincy, 6 Peters, 445. "It is not necessary that the vessel, when she left a port of the United States for a foreign port, and during her passage, and when she arrived at the foreign port, should be armed and in condition for hostilities to constitute an offence."—Ibid. "The preparations to commit hostilities must be made within the United States, and the intention with respect to the employment of the vessel must be formed before she leaves the United States."—Ibid. "The law does not prohibit armed vessels belonging to citizens of the United States from sailing, it only requires the owners to give security. Collectors are not authorized to detain vessels built for warlike purposes and about to depart, unless circumstances render it probable that they are to be employed in violation of the act."—Ibid.

[1] II Halleck, pp. 198, 199; IV Calvo, §§ 2491, 2593, 2616–2636; II Twiss, § 217; Hall, § 19; III Phillimore, § 139; Lawrence, §§ 243–249.

to a hostile expedition originating in a neutral port applies with equal force to the augmentation of force by a ship or fleet in a neutral port, the principle being the same in either case. To "augment" the force of a vessel is to add to or increase her military power or efficiency, or make it possible for her to act more efficiently against the enemy by the addition of war-like stores or material. To increase the armament of such a vessel, to add to its stock of ammunition, or to increase its crew would be a violation of the law which the neutral is bound to prevent.[1]

The Terceira Affair. In 1828 an insurrection broke out in Portugal headed by Dom Miguel, the uncle of the reigning Queen. The Portuguese Government called upon the British Government for aid under the terms of an existing treaty, which guaranteed the maintenance of the royal family upon the throne. This assistance was refused by Great Britain on the ground that the guarantee of the treaty contemplated assistance against external interference and did not apply to a case of domestic insurrection. A considerable number of Portuguese subjects, who had assembled in England, formed a military organization with the design of leaving the Channel ports with a view of entering the service of the Queen. In pursuance of this design four vessels, not armed or equipped as vessels of war, sailed from Plymouth, ostensibly for Brazil. The English ministry, suspecting their design to be to effect a landing at Terceira, ordered a squadron to the Azores with a view to prevent their landing on Portuguese territory. The vessels were intercepted off Porto Praya, their passengers were not permitted to land, and they were forcibly escorted back to

[1] "Converting a merchantman into a cruiser by increasing the number of her guns and adding other equipments is equivalent to an original outfit, within the meaning of the act of Congress."—United States *vs.* Guinet, 2 Dallas, 321. "The mounting of new guns and the opening of new ports is an augmentation of force amounting to a breach of neutrality."—Moodie *vs.* the *Betty Cathcart*, Bee, 43. "Yet the repair of bottoms, copper, etc., does not constitute any increase or augmentation of force within the meaning of the act; and the steamers themselves are not subject to seizure by any judicial process under it."—IV. Opin. of Att.-Gen. p. 336.

the vicinity of the British Channel, where they were released and took refuge in a port of France. In this case, although it violated the sovereignty of Portugal by the use of force in Portuguese waters, Great Britain fully performed its duty as a neutral under the rules of international law.[1]

Case of the "Horsa." The *Horsa* was a Danish steamer, sailing under the Danish flag and papers, and her captain and officers, who were indicted for a violation of the neutrality laws of the United States, were Danish subjects. The *Horsa* was engaged in the fruit trade, and, on November 9, 1895, cleared from Philadelphia for Port Antonio, Jamaica, with orders to proceed to a point on the high seas off the port of Barnegat, New Jersey, and there await orders. At the point thus agreed upon, she was joined, the same night, by a steam-lighter, having on board several cases of merchandise and between thirty and forty passengers; these were transferred to the *Horsa*, which proceeded on her way. During the voyage the packages were opened and the arms and ammunition which they contained were distributed among the passengers, who were drilled and instructed in their use; at the same time the remaining contents of the packages, which included a Maxim gun, were prepared for landing. About six miles off the coast of Cuba, upon which island there was, at the time, an insurrection in progress against Spain, the passengers were disembarked, taking with them the arms and munitions of war which they had brought on board the *Horsa*. The officers of the ship were indicted for a violation of the neutrality laws of the United

[1] Hall, § 222; Dana's Wheaton, § 439, note 215, p. 566; Risley, pp. 194, 195; III Phillimore, pp. 287–296. "In 1870, during the Franco-Prussian War, 1200 Frenchmen left New York for France upon two steamers carrying the French flag and which carried as cargo a large quantity of arms and ammunition. The passengers were French subjects returning to their allegiance at the outbreak of war; they were not officered, they were without organization, and made no use of the arms and ammunition which were contained in the cargoes of the vessels which transported them. The United States government, which had permitted their departure, justified it on the ground that they did not constitute a hostile expedition, and that for that reason their departure from its territorial jurisdiction did not constitute a violation of its neutral obligation." —Risley, pp. 195–197.

States, and were convicted in the court of first instance. The case was carried to the Supreme Court by writ of error, where it was decided that the acts above set forth constituted a hostile expedition, and therefore a violation of the neutral duty of the United States. The judgment of the court below was affirmed as to the captain, but reversed as to the officers of the ship, who were granted a new trial.[1]

Case of the "Itata." In January, 1891, the steamer *Itata* was captured in the harbor of Valparaiso, Chili, by a party of insurgents against the existing government of the republic. She was officered and manned by the insurgents and used by them, from time to time, for transport purposes, for the conveyance of provisions and munitions of war, and as a hospital ship. In April, 1891, one Trumbull, representing the insurgent party, came to the United States and purchased, in New York, a large quantity of arms and ammunition, with the intention of sending them to Chili for the use of the insurrectionary forces. The *Itata* was ordered to California for that purpose, and was escorted as far as Cape San Lucas by the *Esmeralda*, an insurgent cruiser. During her voyage to California the *Itata* had on board four small brass cannon, with ammunition therefor, and took on board, at a Chilian port, twelve soldiers, with their arms and uniforms, who were employed as stokers.

At Cape San Lucas the cannon and ammunition, together with the arms and uniforms of the soldiers, were packed in the hold of the vessel, leaving on deck one small cannon which had been used for saluting purposes. The arms and ammunition were loaded on a schooner at San Francisco, and transported to the island of Santa Catalina, where she expected to meet the *Itata* and transfer her cargo; but this was prevented by the seizure of the *Itata* in the port of San Diego, whither she had gone for coal and stores. The arms were subsequently transferred to the *Itata* near San Clemente Island, off the southern coast of California, and were immediately transported

[1] Wiborg *vs.* U. S. 163 U. S. 632; U. S. *vs.* Ybanez, 53 Fed. Rep. 536; U. S. *vs.* Pena, 69 Fed. Rep. 983.

to Chili. On September 4, 1891, the belligerency of the insurrectionary party in Chili was recognized by the United States. The case was tried in the proper district court of the United States, where it was decided that the facts, as above set forth, did not constitute the fitting-out of a hostile expedition against a government with which the United States was at peace, and that the mere purchase and carriage of arms and warlike stores to a party of insurgents in a foreign country, such munitions not constituting a part of the fittings or furnishings of the vessel, did not constitute a violation of the neutral duty of the United States or violate her neutrality laws.[1]

Case of the "Alabama." The most conspicuous illustration, in recent times, of the failure of a state to observe its neutral obligations is that afforded by the case of the *Alabama*. Among the most pressing needs of the Confederates was that of sea-going ships capable of being used for war. Such vessels as they possessed were, for the most part, very small. There was probably not one of these which could have ventured to engage a Federal cruiser of any class without certain destruction. In coast warfare they were able to achieve one or two brilliant, though unprofitable, successes. But the construction of a large sea-going steamer seems to have been beyond their power; their only ships were such as had fallen into their hands, and they either had not the materials and machinery for turning out marine steam-engines or were unable to use them."[2]

Construction of Cruisers in British Jurisdiction. To enable the Confederates to overcome this disparity of force at sea a scheme was projected of procuring by purchase, in England, a number of war-steamers for the Confederate navy. This undertaking was quite different from those that had preceded it,

[1] The *Itata*, 49 Fed. Rep. 646; Ibid. 56 Fed. Rep. 505; U. S. *vs.* Weed, 5 Wallace, 62; the *Watchful*, 6 Wallace, 91; U. S. *vs.* Trumbull, 48 Fed. Rep. 99; For. Rel. U. S. 1891, pp. 122, 132, 316–322; the *Three Friends*, 166 U. S. 1.

[2] Bernard, The Neutrality of Great Britain, etc., p. 336; for a discussion of the parallelism between this case and that of the Duke of Saldanha, see For. Rel. U. S. 1877, p. 451.

inasmuch as it was proposed that these vessels, so soon as they had been completed and equipped for war, whether in England or elsewhere, should, without being sent to any port within the jurisdiction of the Confederacy, at once engage in hostile operations against the United States. With this end in view, agents were despatched to England with instructions to arrange for the purchase or construction of a number of swift and powerful steamers for this purpose. These agents were to arrange all the details of armament and equipment, and were to transfer them, when completed and ready for service, to certain designated officers of the Confederate navy.

These instructions were carried out in all their essential details. The ships, three in number, which were afterwards known as the *Florida*, *Alabama*, and *Shenandoah*, were purchased or constructed in England. Their armament and equipment were obtained, and a portion of their crews enlisted, in British territory, without encountering any obstacles which do not seem to have been overcome without special difficulty. In every case the ships left England without guns or ammunition on board, and but partly manned; and in every case the articles needed to prepare the vessel for active service, and a part or the whole of the crew, were shipped from England by another vessel, the equipment being completed at a point previously agreed upon, usually in neutral waters, and never within British jurisdiction.

Later History of the Confederate Cruisers. Of the three cruisers whose origin has been alluded to, the career may be briefly told. The *Florida*, on August 11, 1862, completed her armament in neutral West Indian waters, and entered upon her duty of destroying merchant vessels. Her career was terminated in October, 1864, by her illegal capture in the port of Bahia, Brazil.

The *Alabama*, in spite of the urgent remonstrances of the American minister, effected her departure from English waters on the 29th of July, 1862. Her armament and crew were placed on board at Angra Bay, in the Azores Islands, near the end of the following month. After a most eventful career,

during which she succeeded in capturing or destroying fifty-eight merchant vessels, she was defeated and sunk in an engagement with the United States steamer *Kearsarge*, off the port of Havre, France, on June 19, 1864.

The *Shenandoah*, a steamer formerly engaged in the China trade, attracted the attention of the Confederate agents in London by her speed and superior sailing qualities, as well as by her adaptability to the purposes which they had in view. She was, therefore, purchased, and on October 8, 1864, cleared from the Thames, ostensibly for Bombay. Her real destination, however, was the island of Madeira, whither a tender had preceded her containing her armament and crew. The transfer was effected in neutral jurisdiction, as in the preceding cases, about October 21st of the same year. The evidence submitted in the case of this vessel satisfied the Geneva Board of Arbitration that no responsibility attached to the British Government for her conduct up to the date of her arrival at Melbourne, Australia. The circumstances attending her conduct there should have caused her detention, but did not, and for her acts, after the date of her departure from Melbourne, the British Government was held responsible. The career of this vessel is remarkable from the fact that she continued to make captures, in the North Pacific, after the termination of hostilities in the Civil War. Upon being notified of the peace in July, 1865, she was conveyed by her captain to Liverpool, and was there surrendered to the British Government.[1]

Result of their Operations. The result of the operations of these vessels and their tenders was, in effect, to destroy the merchant marine of the United States. Such of its ships as escaped capture or destruction were transferred to foreign flags, to secure an immunity from capture by acquiring the neutral character. The question continued an open one between the governments for a number of years, subjecting their relations to a constant strain, and at times taking such a turn

[1] For Captain Waddell's letter to the Secretary of Foreign Affairs, surrendering this vessel, see Bernard, pp. 434–439.

as to render war between them a not unlikely occurrence. Several attempts at settlement were made, but without success, owing to the excited state of feeling at the time. The question was finally put in the way of adjustment by the negotiation of the Treaty of Washington, in 1871.

Manner in which the Neutral Duty of Great Britain was Performed. It has been seen that, during the continuance of the Civil War, three war steamers were obtained by the Confederate States in England by purchase and construction. Over the acts of those persons within its jurisdiction who had to do with such purchase and construction the British Government had undisputed control. Its duty and responsibility in the premises should have been known to the individual members of the government; and the ease with which the American minister was able to obtain detailed information as to the purpose and ultimate destination of these vessels shows that no insuperable difficulties lay in the way of its obtaining similar knowledge, upon which to act in the performance of its neutral duty.

In the performance of its duty as a neutral, however, the British Government displayed not only a singular and unusual lack of energy and vigilance, but a more remarkable failure to discern the true point at issue. In a manner entirely in accordance with English tradition, it seems to have been taken for granted that a more or less vigorous enforcement of the existing neutrality laws would constitute a sufficient performance of its neutral duty, and a sufficient fulfilment of its neutral obligation. The action of the government, therefore, was not only confined to the enforcement of its neutrality law, but a peculiar construction was placed upon that law, by which it was deemed no violation of its provisions to construct a ship, even for an admitted warlike purpose, if no portion of its equipment and armament was contributed by its builders, or placed on board within British territorial jurisdiction.

Neutral Responsibility of Great Britain. From what mistaken view of international duty such an idea was deduced it is not

necessary to discuss here. Acts like those of which the United States complained were opposed to the usages of nations, because they constituted hostile attempts against a friendly power, and originated within neutral jurisdiction. A belligerent has no right, or color of right, to interfere in any manner with the internal administration of a sovereign state. He must judge of the attitude and intentions of that state by its acts, or by the acts of individuals which have originated within its territory. If an act of hostility originate in a neutral state, it matters not by whom it is committed, the neutral is entirely responsible for its effects and results, whatever they may be; and no other course is open to a belligerent than to hold such neutral to a strict accountability for events over which he has, and may exercise, a jurisdiction in every way adequate to his responsibility.

The Geneva Arbitration

History. The most striking and successful example of the settlement of an international difference of the gravest character, by a resort to the principle of arbitration, is furnished by the adjustment of the dispute between the United States and England growing out of the *Alabama* Claims. It was impossible that a difference of such serious importance could long exist without endangering the friendly relations of the two powers, and, at different times between the years 1863 and 1869, efforts were made with a view to its adjustment. None of them, however, were successful. The first attempt was made, in 1863, by Mr. Adams, the United States minister to England. He submitted a proposition which was held under advisement for a time by the British cabinet, but was finally declined in 1865. Another effort was made in 1866, and negotiations were continued until, in January, 1868, they were broken off, apparently without hope of renewal. In 1869 they were again renewed by Mr. Reverdy Johnson, who had succeeded Mr. Adams as the American representative in England. An agreement was entered into, between Mr. Johnson and the Earl of Clarendon, by which the claims were to be

referred to a commission selected by the interested powers. This agreement was not ratified by the United States Senate, a co-ordinate branch of the treaty-making power, and thus, for the third time, the efforts at adjustment were abandoned.

The Treaty of Washington. In 1870 a dispute arose between the United States and Canada, as to the right of American citizens to participate in the fisheries in certain British territorial waters of North America. As the agitation of the question seemed likely to introduce a new element of difficulty into the complications already existing between the two governments, a proposal was submitted, through the British minister, to the government in Washington for the appointment of a *Joint Commission.* The commission was to be composed, in equal numbers, of members selected by each government, and was to be charged with the adjustment, not only of the fishing dispute, but of all questions which might affect the relations of the United States with the British possessions in North America. To this proposition a reply was made, in behalf of the United States, that the project of the commission would not be favorably considered unless its powers were extended to include the settlement of the differences which had arisen, during the Civil War, out of the acts committed by Confederate cruisers, which had given rise to the demands known as the *Alabama* Claims.[1]

The proposition of the United States was accepted, and an agreement was entered into providing for the organization of a commission of ten members, selected in equal numbers by the governments of England and the United States. The commission was to sit in the city of Washington, and was to address itself to the task of providing a means of adjusting all causes of difference then existing between the two countries.

The commission thus provided for met in Washington on March 4, 1871. Its labors terminated on May 8th, with the completion and signature of the Treaty of Washington. That instrument provided for the reference of the *Alabama* Claims

[1] Revue de Droit International, vol. iii. 1871, p. 113.

to a tribunal of arbitration to be composed of five members. Of these one was to be selected by each of the contracting parties, and one each by the King of Italy, the President of the Swiss Confederation, and the Emperor of Brazil. The tribunal was to meet in Geneva, on the earliest convenient day after the nomination of its members. A case was to be submitted, by each of the contracting parties; and within four months thereafter either party might, in its discretion, submit a counter case in reply to the evidence and correspondence adduced by the other in support of its claim.

The Three Rules for the Guidance of the Tribunal. The tribunal, in deciding the case, was to be guided by three rules which were incorporated in the treaty and mutually agreed to by the litigant powers. The agreement on the part of Great Britain was qualified by the declaration that "her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned arose, but that her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries arising out of these claims, the arbitrators should assume that her Majesty's Government had undertaken to act upon the principles set forth in the rules."[1]

The three rules are, "A neutral government is bound—

(*a.*) "To use due diligence to prevent the fitting-out, arming, equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use."

(*b.*) "Not to permit or suffer either belligerent to make use

[1] Treaties and Conventions of the United States, 1776–1887, p. 481.

of its ports or waters as a base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men."

(*c.*) "To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violations of the foregoing obligations and duties."

Procedure and Finding. The decision of the tribunal was to be rendered, if possible, within three months after the arguments on both sides had been closed. It was to be in writing, prepared in duplicate, and signed by the arbitrators who assented to it. The question referred for decision, as to each vessel separately, was "whether Great Britain has, by any act of omission, failed to fulfil any of the duties set forth in the foregoing three rules, or recognized by the principles of international law not inconsistent with such rules."[1]

"In case the tribunal finds that Great Britain has failed to fulfil any duty, or duties, as aforesaid, it may, if it think proper, proceed to award a sum in gross, to be paid by Great Britain to the United States, for all the claims referred to it; and in such case the gross sum so awarded shall be paid in coin by the government of Great Britain to the government of the United States, at Washington, within twelve months after the date of the award.[2]

"In case the tribunal find that Great Britain has failed to fulfil any duty, or duties, as aforesaid, and does not award a sum in gross, the high contracting parties agree that a board of assessors shall be appointed to ascertain and determine what claims are valid, and what amount or amounts shall be paid by Great Britain to the United States on account of the liability arising from such failures, as to each vessel, according to the extent of such liability as determined by the arbitrators."[3]

Meeting of the Tribunal of Arbitration. The tribunal met at Geneva on December 15, 1871. The full powers of the arbitrators were exchanged, and the board was organized by

[1] Treaties and Conventions of the United States, 1776–1887, p. 481.

[2] Ibid. p. 482.

[3] Ibid.

the selection of Count Sclopis, the Italian representative, as president. The cases were submitted by the agents of the respective governments, and the tribunal directed that the counter cases, additional documents, correspondence, and evidence should be delivered to the secretary on or before April 15, 1872. After making some arrangements as to procedure, the tribunal, on the following day, adjourned to meet on June 15, 1872.

Indirect Claims. In the case submitted by the United States certain claims appeared for damages due under the heads of—

1st. "The losses in the transfer of the American commercial marine to the British flag."

2d. "The enhanced rates of insurance."

3d. "The prolongation of the war, and the addition of a large sum to the cost of the war and the suppression of the rebellion."

The consideration of these indirect claims by the tribunal was objected to by the agent of the British Government; and the tribunal decided that, according to the rules of international law applicable to such cases, they did not constitute a good foundation for an award, and should be wholly excluded from the consideration of the tribunal in making its award. This ruling was accepted by both of the governments interested.[1]

Rules of Interpretation. Before the members of the tribunal were able to apply the rules furnished them in the treaty to the decision of the case they were obliged to place an interpretation upon some of the terms there used, and to define the rule of international law upon certain points which were involved in the judicial determination of questions not covered by the rules themselves. It was therefore decided—

(1.) That *due diligence* "ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part."

[1] For. Rel. U. S. 1872, 1873, "Geneva Arbitration," vol. iv. p. 20.

(2.) "The effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power benefited by the violation of neutrality may afterwards have granted to that vessel; and the ultimate step by which the offence is completed cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence."

(3.) "The principle of exterritoriality has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality."[1]

Decision. A decision was reached by the tribunal at the session of September 9, 1872. It was concurred in and signed by four of the members, the English representative offering a dissenting opinion. On September 14, after directing that a copy of the decision should be delivered to each of the agents of the two governments, the tribunal was dissolved.

Award. In the cases of the *Alabama*, of the *Florida*, and of the *Shenandoah* after her departure from Melbourne on February 18, 1865, the tribunal was of opinion that Great Britain had failed, by omission, to perform the duties prescribed in two or more of the rules of Article VI. of the Treaty of Washington.[2]

[1] For. Rel. U. S. 1872, 1873, "Geneva Arbitration," vol. iv. pp. 49, 50.

[2] "The finding in the case of the *Alabama* was of a failure in respect to the first and third rules; in the case of the *Florida*, of the first, second, and third; in the case of the *Shenandoah*, of the second and third respectively. The *Tuscaloosa*, a tender of the *Alabama*, and the *Clarence*, *Tacony*, and *Archer*, tenders of the *Florida*, were held to be involved in the lot of their principals. It was held in the cases of the *Georgia*, *Sumter*, *Nashville*, *Tallahassee*, and *Chickamauga* that Great Britain had not failed to observe the three rules. The cases of the *Sallie*, *Jeff Davis*, *Music*, *Boston*, and *V. H. Joy* were excluded from consideration for want of evidence."—For. Rel. U. S. 1872, 1873, "Geneva Arbitration," vol. iv. pp. 51, 53.

The sum of $15,500,000 in gold was awarded to the United States as the indemnity to be paid by Great Britain for the satisfaction of all the claims referred to the consideration of the tribunal; and, in accordance with the terms of Article XI. of the treaty, it was declared that "all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled."[1]

Results of the Geneva Arbitration. The effect of the Geneva Arbitration upon international law has been much discussed, especially in connection with a clause in the treaty which binds the high contracting parties "to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them."[2] Neither power is believed to have made any special or positive efforts to include other states in the operations of the treaty. In so far as the rules themselves are concerned, such action seems hardly necessary. Their effect has not been to change any existing rule of international law, for the strict observance of neutral obligation and duty would require substantial compliance with their provisions by any neutral state in time of war. Their chief effect has been to define and make clear a principle already existing, and so generally sanctioned by the usage of nations as to cause it to be regarded as a doctrine of international law.[3]

[1] For. Rel. U. S. 1872, 1873; "Geneva Arbitration," vol. iv. p. 53.

[2] Treaties and Conventions of the United States, 1776–1887, p. 481.

[3] "Before an award had been rendered an attempt was made to carry out the provisions of the Treaty of Washington by bringing the rules to the attention of the powers with a view to their adoption. The correspondence on this subject, which was interrupted in 1872, was resumed in 1873, and terminated, without result in the way of adhesions, in 1876. In January, 1879, the correspondence was submitted to the Senate by President Grant. The correspondence clearly establishes that there was no disposition on the part of the two powers, least so on the part of Great Britain, to make the submission; and from the subsequent silence we are to infer that the three rules are to be limited in their operation to the single matter of the *Alabama* Claims, and as withdrawn from any proposed reform of the law of nations. It may be added that there was a conviction on the part of both governments that they would not receive the assent of a single state. Austria and Germany had early given instructions to that effect. The

Not the least important of its effects, however, will be found to consist in the example afforded of two powerful states resorting to an amicable method of terminating a dispute which had aroused in both nations a feeling dangerously near to hostility, and which threatened upon more than one occasion to involve them in open war.

Right of Asylum. A state in becoming a neutral cannot divest itself of its duties to other states and to their individual subjects which are incumbent upon it in time of peace. These continue in force, but certain precautions incident to and made necessary by the fact of war must be observed in their performance.

Asylum to Troops. A neutral is obliged to grant an asylum to individuals of the enemy who come into its territorial limits to escape pursuit or to find protection from acts of hostility. They become subject to neutral jurisdiction so soon as they enter its territory. If fleeing from an enemy, they are disarmed, and, at the discretion of the neutral government, may be removed to points in the interior, and may there be subjected to such measures of police supervision or positive restraint as it may deem necessary to secure respect for its neutrality. If in large numbers and without means of support, these fugitives are made the subject of treaty arrangements and are usually supported at the expense of their own government.[1] The French troops who fled to Belgium after the battle of Sedan were disarmed and conveyed

three rules, however, after having been greatly modified by Bluntschli and other Continental jurists, received in 1875 the assent of a majority of the members of the Institute of International Law present at The Hague (Annuaire 1877, p. 139). The approval of the rules was opposed by the English members of the Institute, and by English writers on international law who were not included in its membership."—II Wharton, Amer. Crim. Law, § 1908, pp. 663, 664; III Phillimore, pp. 268–273; Creasy, pp. 316–345; Manning, pp. 239–244; Hall, pp. 615, 616; II Halleck, pp. 184–194, note; IV Calvo, §§ 2558–2582.

[1] Hall, § 230; Creasy, p. 586; Woolsey, § 167; Risley, pp. 173–175; Snow, p. 120; Articles 57, 58 Conference of The Hague; II Ortolan, pp. 283–286; Klüber, §§ 283–285; Vattel, liv. iii. chap. vii. § 133; Hefftter, § 149; II Halleck, pp. 183, 184; IV Calvo, §§ 2668–2684.

to a point at some distance from the frontier, and the expense of their maintenance was ultimately defrayed by the French Government.

Asylum to Public and Private Armed Vessels. A similar right of asylum exists in the case of public and private armed vessels, and to merchant ships belonging to either belligerent. They may seek refuge in a neutral port from the perils of the sea or from a superior force of the enemy. The protection of the neutral government is extended to them so soon as they come within its territorial waters; and it may resist, by force if need be, any hostile attempts that are directed against them while within its jurisdiction.[1] As the favor is that of asylum only, the asylum may terminate at the will of the neutral. When vessels of two belligerents are found in a neutral port at the same time, it is within the power of the neutral to establish such regulations in regard to their conduct and departure as will make it impossible for an engagement to take place in the immediate vicinity of the port. This object is usually attained by the enforcement of the *twenty-four-hour*

[1] "Belligerent ships-of-war, privateers, and the prizes of either, are entitled, on the score of humanity, to temporary refuge in neutral waters from casualties of the sea and land."—The *President* and Prize, VII Opin. Att.-Gen. p. 122 (Cushing, 1855). "By the law of nations belligerent ships-of-war, with their prizes, enjoy asylum in neutral ports for the purpose of obtaining supplies or undergoing repairs, according to the discretion of the neutral sovereign, who may refuse the asylum absolutely, or grant it under such conditions of duration, place, and other circumstances as he shall see fit; provided that he must be strictly impartial in this respect towards all the belligerent powers."—Ibid. "Where the neutral state has not signified its determination to refuse the privilege of asylum to belligerent ships-of-war, privateers, or their prizes, either belligerent has a right to assume its existence, and enter upon its enjoyment, subject to such regulations and limitations as the neutral state may please to prescribe for its own security."—Ibid. "The United States have not by treaty with any of the present belligerents bound themselves to accord asylum to either; but neither have the United States given notice that they will not do it; and, of course, our ports are open for lawful purposes to the ships-of-war of either Great Britain, France, Russia, Turkey, or Sardinia."—Ibid. II Twiss, §§ 219–222; Risley, pp. 175, 176; Dana's Wheaton, § 429–434; III Dig. Int. Law, § 394; VII Opin. Att.-Gen. p. 122; Hall, § 231; Boyd's Wheaton, § 434–434e; Creasy, pp. 584–586; Woolsey, § 167; II Halleck, p. 182; II Ortolan, pp. 286–289.

rule, by which, when one belligerent vessel departs, the other is forbidden to sail within twenty-four hours. This rule has been so frequently and generally applied in recent times as to have received the universal sanction of nations.[1]

NEUTRAL RIGHTS

Nature and Character. The law of nations not only imposes certain duties upon neutral states in time of war—it also clothes them with certain rights and immunities which the belligerents are bound to respect in the conduct of their military and naval operations. These so-called neutral rights, however, do not differ in any respect from the rights which are universally recognized as belonging to every state in the civilized world in virtue of its sovereignty and independence; and a neutral state, as such, receives no addition to its sovereign rights, either in number or extent, at the outbreak of war. It is at peace with both belligerents, and they have no greater

[1] II Ortolan, pp. 291–298; Hall, pp. 631–633; Bluntschli, § 776 bis; II Halleck, p. 152; Risley, pp. 206–208. So long ago as 1759 Spain laid down the rule that the first of two vessels of war belonging to different belligerents to leave one of her ports should only be followed by the other after an interval of twenty-four hours.—Ortolan, Dip. de la Mer, p. 257. "In 1778 the Grand Duke of Tuscany forbade both ships-of-war and privateers to go out for twenty-four hours after a ship, whether enemy or neutral (*di qualsivoglia bandiera*)."—De Martens, Rec. vol. iii. p. 25. "The Genoese rule was the same; Venice was contented with the promises of the departing commander that he would not molest an enemy or neutral for twenty-four hours, but she retained privateers for that time in port."—Ibid. p. 8. "The Austrian proclamation of neutrality of 1803 ordered vessels not to hover outside of the Austrian ports, nor to follow their enemies out of them; it also imposed the twenty-four-hour rule on privateers, and, in the case of ships-of-war, required the word of the captain that he would not commit hostilities."—Hall, p. 631, note. The efficacy of what is called the "twenty-four-hour rule" consists largely in the facility and certainty with which it can be enforced. The neutral state does not undertake to say which one of two belligerent vessels of war shall first leave the neutral port. The instant, however, that one of them takes its departure the rule becomes operative upon the other, which is forbidden to leave port until twenty-four hours shall have elapsed after the departure of its predecessor. See, also, I Pistoye et Duverdy, p. 108; Bernard, Neutrality of Great Britain, p. 273; Bluntschli, § 777 bis.

right to commit acts of hostility within its jurisdiction in time of war than in time of peace. The neutral, therefore, may not only insist upon a complete immunity from such acts of belligerency, but may use force to compel respect to its sovereignty within the sphere of its exclusive jurisdiction, and to resist acts of aggression originating with either belligerent, and directed against the neutral state, or against the other belligerent, in neutral territory. Violations of neutral right have occurred not infrequently in the past, and, as the sphere within which neutral rights are each year more strongly insisted upon is steadily increasing, such violations are likely to occur quite as frequently in the future.

Immunity of Neutral Waters from Acts of Belligerency. A neutral state may, therefore, insist upon an entire immunity from acts of belligerency within its territorial waters. A public vessel, by sailing through the coast sea of a neutral state, in no way violates its neutrality. This is especially true when the act is done in the simple prosecution of a voyage, and when not in pursuit of the enemy. It has been seen that a belligerent vessel, either public or private, is entitled to an asylum in the port of a neutral from danger of capture by an enemy as well as from the perils of the sea. An armed vessel, therefore, which pursues an enemy into neutral waters, or effects a capture there, has violated the sovereignty of the neutral state. It may be forcibly compelled to desist from the pursuit, and all captures made by it in neutral jurisdiction are illegal, and must be restored. The sovereignty of the neutral state has been invaded, and it may resort to such measures of prevention or redress as it may deem best suited to the emergency of the case.[1]

[1] "A capture made within the neutral territory is, as between the belligerents, rightful; and its validity can only be questioned by the neutral state."—The *Anne*, 3 Wheaton, 435. "If the captured vessel commence hostilities upon the captor, she forfeits the neutral protection, and the capture is not an injury for which redress can be sought from the neutral sovereign."—Ibid. "The question of prize or no prize belongs exclusively to the courts of the captor, and in no case does a neutral assume the right of deciding it. But offences may be committed

Immunity of Neutral Territory. A neutral state is entitled to a similar immunity from acts of belligerency on land. Troops fleeing from an enemy may seek an asylum in neutral territory. They must release their prisoners, however, give up all booty and captured property, and surrender their arms during the period of their sojourn upon neutral soil. The enemy must cease his pursuit at the neutral boundary. Should he continue it farther, his act is one of invasion, and would be properly regarded as an act of hostility by the neutral state whose sovereignty is offended. Should either belligerent undertake to perform acts, within the territory of a friendly state, which are inconsistent with the neutrality of that state, the neutral may not only cause such acts to be immediately desisted from, but may punish the agents of the belligerent, if their acts are in violation of its municipal laws, or may forcibly eject them from its territory.[1]

by a belligerent against a neutral, in his military operations, which it would be inconsistent with the neutral character to permit, and which give to the other belligerent, the party injured by those operations, claims upon the neutral which he is not at liberty to disregard. In such a situation the neutral has a double duty to perform: he must vindicate his own rights and afford redress to the party injured by their violation. If the wrong-doer comes completely within the power of the neutral, the practice of this government is to restore the thing wrongfully taken." — The *Santissima Trinidad*, 1 Brockenbrough, 478. "If a ship or cargo is enemy property, or if either be otherwise liable to condemnation, the circumstance that the vessel, at the time of the capture, was in neutral waters would not, by itself, avail the claimants in a prize-court. It might constitute a ground of claim by the neutral power, whose territories had suffered trespass, for apology or indemnity. But neither an enemy, nor a neutral acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters." — The *Sir William Peel*, 5 Wallace, 517; the *Adela*, 6 Wallace, 266. "In cases of violation of our neutrality by any of the belligerents, if the prize comes voluntarily within our territory, it is restored to the original owners by the courts."—*La Amistad de Rues*, 5 Wheaton, 385. "But their jurisdiction for this purpose, under the law of nations, extends only to restitution of the specific property, with costs and expenses during the pendency of the suit, and does not extend to the infliction of vindictive damages or compensation for plunderage, as in ordinary cases of marine torts."—Ibid.

[1] II Halleck, p. 177; II Twiss, pp. 440–444; III Phillimore, p. 285; Manning, pp. 245–250; Hautefeuille, tit. iv. chap. i.; Risley, pp. 172, 173; Walker, Manual, §§ 59, 60;

Demand for Restitution, by Whom Made. "Though it is the duty of the captor's country to make restitution of the property thus captured within the territorial jurisdiction of the neutral's state, yet it is the technical rule of the prize-courts to restore to the individual claimant, in such a case, only when on the application of the neutral government whose territory has been thus violated. This rule is founded on the principle that the neutral state alone has been injured by the capture, and that the hostile claimant has no right to appear for the purpose of suggesting the invalidity of the capture."[1]

This subject is illustrated by the following cases:

Case of the "Chesapeake." The *Chesapeake* was one of a line of passenger steamers plying between the ports of New York and Portland, Maine. In 1863, while on her way between those points, she was forcibly seized by a number of her passengers, who claimed to be in the naval service of the Confederate States. In effecting the seizure several of the crew were killed and wounded, and the rest were set on shore. The vessel was navigated for a short time by its captors, but was finally abandoned by them, in an unfrequented bay on the coast of Nova Scotia. She was afterwards found and seized, in British territorial waters, by a public armed vessel of the United States. The act was complained of by the British Government as a violation of its neutrality, and a demand was made that the vessel be surrendered and the prisoners restored to British soil. The demand was acceded to by the United States, who disclaimed any intention of exercising any authority within the territorial jurisdiction of Great Britain. The government of the United States, in complying with the demand for the surrender of the property and persons, proposed

Dana's Wheaton, §§ 426, 427; Snow, pp. 119–121; IV Calvo, §§ 2644–2652.

[1] Boyd's Wheaton, § 430; the *Anne*, 3 Wheaton, p. 435; Manning, pp. 465–467; Hall, § 227; II Twiss, pp. 442, 443; Snow, pp. 110–123; Risley, pp. 172, 173; Walker, Manual, p. 133; II Halleck, pp. 204, 205; the *Anne*, 5 C. Rob. Rep. 373; Snow's Cases, Int. Law, p. 393; Heffter, §§ 146–150; the *General Armstrong*, Snow's Cases, p. 396; the *Perle*, I Pistoye et Duverdy, 100; Snow's Cases, p. 398.

that those who had been concerned in the forcible seizure of the vessel should be surrendered, with a view to their prosecution for the crime of piracy. The British Government declined to consider this proposition until the captured persons had been returned to its territorial jurisdiction. The ship was afterwards restored to its owners.[1]

Case of the "Florida." In 1864 the Confederate war steamer *Florida* entered the port of Bahia, Brazil, for the purpose of obtaining coal and provisions, and of effecting some necessary repairs. While thus engaged, the *Wachusett*, a public armed vessel of the United States, entered the same port. The Brazilian Government, fearing a conflict, took such precautions as it deemed proper to prevent its occurrence, and, in accordance with its port regulations, assigned an anchoring-ground to each of the belligerent vessels. The commander of the *Wachusett*, taking advantage of the absence, at night, of a number of the officers and crew of the *Florida*, sent a boat's crew to attach a cable to the Confederate steamer, towed her out of the harbor, and conveyed her as a prize to the United States. This flagrant violation of neutral rights was at once complained of by the Brazilian Government, and the act was promptly disavowed by the United States. An apology was offered, and reparation made by saluting the Brazilian flag in the port of Bahia. The crew of the *Florida* were restored to Brazilian jurisdiction. The captured vessel foundered in Hampton Roads, under circumstances which were satisfactorily explained to the Brazilian Government.[2] "The restitution of the ship having thus become impossible, the President expressed his regret that the sovereignty of Brazil had been violated, dismissed the consul at Bahia, who had advised the offence, and sent the commander of the *Wachusett* before a court-martial."[3]

[1] I Dig. Int. Law, § 27; Dana's Wheaton, § 430, note 207; IV Calvo, § 2659.

[2] Seward to Da Silva, December 26, 1864. III Dig. Int. Law, §§ 27, 399; Boyd's Wheaton, p. 499; Hall, p. 624; Dana's Wheaton, p. 526, note 209. See, also, Secretary Seward's letter of explanation, Foreign Relations of the U. S. 1863, 1864.

[3] Bernard, Neutrality of Great Britain, etc. p. 433.

Neutral Territory. As hostilities in time of war can only lawfully take place in the territory of either belligerent, or on the high seas, it follows that neutral territory, as such, is entitled to an entire immunity from acts of hostility; it cannot be entered by armed bodies of belligerents, because such an entry would constitute an invasion of the territory, and therefore of the sovereignty, of the neutral; nor, for the same reason, can a public armed vessel of either belligerent enter the territorial waters of a neutral with intent to do an act of hostility. The territory and territorial waters of a neutral state are, therefore, sacred from belligerent intrusion, save with the consent of the neutral government.[1] Such consent may be granted, or denied, to both belligerents; but, according to the present rule, cannot be granted to either to the exclusion of the other.

Captures made in neutral waters are restored, or indemnified, even after they have been condemned by a prize-court, since such courts have no jurisdiction over prizes made except on the high seas or within the territorial waters of a belligerent. "It belongs, however, exclusively to the neutral government to raise objection to a title founded upon a capture made within neutral territory. So far as the adverse belligerent is concerned, he has no right to complain if the case be tried before a competent court.[2] The government of the owner of the captured property may, indeed, call the neutral to account for permitting a fraudulent, unworthy, or unnecessary violation of its jurisdiction, and such permission may, according to the circumstances, convert the neutral into a belligerent."[3]

The right of a public armed vessel of a belligerent to enter a neutral port, when not in distress, is usually conceded, and is presumed, unless notice to the contrary is formally given by the neutral government. They may be forbidden to enter

[1] III Phillimore, p. 285; II Halleck, p. 177; Dana's Wheaton, § 426; Risley, pp. 172, 173; Hall, §§ 227, 228; II Twiss, § 217; IV Calvo, §§ 2654–2667; Heffter, § 149; Klüber, § 285; Bluntschli, §§ 784–786.

[2] III Phillimore, p. 287; the *Arrogante Barcelones*, 7 Wheaton, 496; *La Amistad*, 5 Ibid. 390; Dana's Wheaton, § 428; Hall, § 227.

[3] III Phillimore, p. 287; Dana's Wheaton, § 431; Hall, § 227.

certain ports, or to enter neutral territory at all except in distress, but the rule must bear equally upon both belligerents.[1] Privateers may be denied entrance to neutral ports, especially if the neutral government is a party to the Declaration of Paris. The bringing-in of prizes is still authorized by existing treaties, though the present tendency is to restrict the right within the narrowest limits, if not to deny it altogether.[2] The condemnation or sale of such prizes by a neutral prize-court, or by a belligerent prize-court sitting in neutral territory, is no longer permitted.

A belligerent war-ship which has been permitted to enter a neutral port may procure there such supplies, not contraband of war, as may be permitted by the neutral government. The supply of coal is now made the subject of special regulation, and only a limited amount is allowed to be taken in.[3]

The present tendency of the rules of international law is towards greater stringency in respect to the articles of supply which a belligerent vessel of war may receive in a neutral port. "When vessels were at the mercy of the winds it was not possible to measure with accuracy the supplies which might be furnished them, and, as blockades were seldom continuously effective, and the nations which carried on distant naval operations were all provided with colonies, questions could hardly spring from the use of foreign possessions as a source of sup-

[1] II Halleck, p. 183; Dana's Wheaton, § 434; VII Opin. Att.-Gen. p. 122; Hall, §§ 230, 231; the *Exchange*, 7 Cranch, 116.

[2] II Twiss, § 201; I Hautefeuille, p. 380; VII Opin. Att.-Gen. p. 122; IV Calvo, §§ 2676–2683.

[3] Hall, pp. 607, 608; II Halleck, p. 181; Martens, Précis du Droit de Gens, § 312. During the American Civil War, the British Government (on January 31, 1862) adopted the rule that a belligerent armed vessel was to be permitted to receive, at any British port, a supply of coal sufficient to enable her to reach a port of her own country, or a nearer destination. A second supply was not to be given within three months save with the express permission of the government.—Earl Russell to Admiralty Commissioners, January 31, 1862, State Papers, 1871, lxxi. p. 167. Similar instructions were issued by the United States Government during the Franco-Prussian War.—President's Proclamation of October 8, 1870, 16 Stat. at Large, 1135. See, also, II Ortolan, p. 286; Bluntschli, § 773; IV Calvo, §§ 2676–2684; Heffter, § 149.

plies. Under the altered conditions of warfare matters are changed. When supplies can be meted out in accordance with the necessities of the case, to permit more to be obtained than can, in a reasonably liberal sense of the word, be called necessary for reaching a place of safety is to provide the belligerent with means of aggressive action; and, consequently, to violate the essential principles of neutrality."[1]

NEUTRALITY LAWS

Character and Purpose. Those municipal laws of a state which are intended to prevent violations of its neutrality in time of war are called, in general, *neutrality laws.* The title varies in different states, and in many cases is based upon the particular violation of neutrality which was first made the subject of positive legislation.[2]

Neutral Obligation Determined by International, not Municipal, Law. It has been seen that the neutral obligation of a state is determined by international, and not by municipal, law. The conduct of every state which assumes the position of a neutral in war is, therefore, measured by the standard of international law. If it fails in the performance of a neutral duty, it cannot plead the inefficiency of its municipal laws in extenuation of its offence, nor will an exact and rigorous enforcement of such laws be regarded as a fulfilment of its obligation if their provisions are not in accordance with the international standard. The neutrality laws of a state may therefore be, in point of efficiency, less than, equal to, or greater than the standard of neutral obligation as determined by the law of nations; or there may be no such municipal laws. In all these cases the responsibility of the state is precisely the same.[3]

[1] Hall, pp. 607, 608; II Ortolan, p. 286; Bluntschli, § 773; Heffter, § 149; IV Calvo, § 2591.

[2] In England the first legislation on the subject was caused, in the time of James I., by the enlistment of recruits in England for service in other European armies. For this reason the British neutrality laws have received the name of the "Foreign Enlistment Acts."

[3] II Twiss, § 216; III Phillimore, pp. 225, 226; III Dig. Int. Law, § 402a, p. 645, par. v.; Fish to Motley,

Most modern states, however, have covered this field of legislation more or less completely, either with positive laws, defining rules of conduct for persons subject to their jurisdiction, and imposing suitable penalties for their violation, or by general laws, or constitutional provisions, vesting discretionary powers in certain departments of government, to be used for the purpose of preventing violations of neutrality on the part of individuals. Violations of neutral duty by a state, in its corporate capacity, are questions of state policy that are rarely made the subject of municipal legislation. Neutrality laws, as such, have chiefly to do with the acts of individuals. They permit or forbid particular acts, and vest suitable powers of enforcement in certain officials or departments of government.

English Neutrality Laws. The first legislation in England on the subject of neutrality was had in the reign of James I. The statute was intended to regulate, rather than prohibit, the enlistment of British subjects in foreign services.[1] This statute was twice amended during the reign of George II., each time in the direction of greater severity.[2] The first general law on the subject of neutrality was the Foreign Enlistment Act passed in 1819, during the regency.[3] It remained in force until 1870, when the present act was passed.[4]

"The statute of 1819 was, with a few unimportant exceptions, never attempted to be enforced until the period of the American Civil War. Its deficiencies were then fully discovered, and the escape of the *Alabama*, the Treaty of Washington in 1871, and the Geneva Arbitration were the grave consequences."[5]

The neutrality laws now in force in the British empire are

September 25, 1869; III Dig. Int. Law, § 403, p. 653; II Ferguson, § 226; Hall, §§ 19–22; Wharton, Com. Amer. Law, § 241; Wharton, Crim. Law, 9th ed. § 1901; *North American Review*, October, 1866, p. 493; II Halleck, pp. 305–307; IV Calvo, §§ 2615–2617.

[1] 3 James I. chap. iv.

[2] 9 George II. chap. xxx.; 29 George II. chap. xvii.

[3] 59 George III. chap. lxix.

[4] 33 and 34 Vict. chap. xc.

[5] III Phillimore, p. 244; II Halleck, pp. 205, 206.

those contained in what is known as the Foreign Enlistment Act of 1870. They extend to all the dominions of her Majesty, including the adjacent territorial waters. The act forbids British subjects to accept, or agree to accept, a commission in the military or naval service of a state at war with any state with which her Majesty is at peace; to leave the realm with intent to engage in such service, or to induce another person to embark under false representations as to such service; and imposes a penalty upon any master of a ship who knowingly takes such persons on board ship, with intent to carry them to such state. It is also forbidden under severe penalties of fine and imprisonment—

(*a.*) "To build, or agree to build, or to cause to be built, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state."

(*b.*) "To issue or deliver any commission for any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state."

(*c.*) "To equip any ship, with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state."

(*d.*) "To despatch, or cause or allow to be despatched, any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign state at war with a friendly state."

When a ship is built by the order of a foreign state at war with a friendly state, the presumption is that it is intended for the naval service of the former state.

It is also forbidden to increase the armament, equipment, or force of such ships, or to aid in their construction or equipment, and it is also forbidden to fit out, or aid or assist in fit-

ting out, any expedition against the dominions of a friendly state. The ships engaged in such acts are to be forfeited, and penalties of fine and imprisonment are to be imposed upon all persons violating any of the provisions of the act.[1]

The provisions of this act are of the most stringent character, and, if rigidly enforced, are calculated to prevent any act, on the part of any person within the jurisdiction of Great Britain, which can, in the remotest degree, compromise the neutrality of the British Government.

Neutrality Laws of the United States. The neutrality laws of the United States are chiefly contained in the acts of June 5, 1794, and April 20, 1818. By these acts it is declared a misdemeanor for any citizen of the United States to accept or exercise a commission to serve a foreign state in war against any friendly state; or to enlist, or enter himself, or hire or retain another person to enlist, or to go beyond the jurisdiction of the United States to enlist, or with intent to be enlisted, into such foreign service; or to fit out or arm, or to increase or augment the force of any armed vessel, with the intent that such vessel shall be employed in the service of a power at war with a friendly state; or to begin, set on foot, or provide or prepare the means for, any military expedition or enterprise against the territory of any foreign state with whom the United States is at peace.

The President is authorized to compel any foreign vessel to depart which, by the law of nations or by treaty, ought not to remain within the territorial waters of the United States, and is given power to use the public armed force to carry the provisions of the act into effect, and to enforce the observance of the neutral duties required by law.[2]

It is worthy of remark that the neutrality laws of the United States, though passed nearly seventy years ago, are at the present time fully in accordance with the standard of neutral obligation as determined by international law.

[1] 33 and 34 Vict. chap. xc.; III Phillimore, pp. 236–242.

[2] Revised Statutes of the United States. §§ 5281–5291; II Halleck, pp. 199–204.

The laws of both England and the United States are silent upon the question of the manufacture and sale of contraband of war, within their territorial jurisdiction, except in the case of building, arming, or equipping ships, fitted for, or adapted to, warlike uses. Dealing in contraband is forbidden in England, by proclamation, at the outbreak of a foreign war. It has never been forbidden in the United States. The policy of both governments has been to leave this question to be regulated by belligerents, in the exercise of the powers placed in their hands for that purpose by the law of nations.

Neutrality Laws of Other States. The provisions of the French law on the subject of neutrality are those contained in Articles 84 and 85 of the Penal Code. The first of these imposes a penalty of banishment for any conduct of a subject which, without the approval of his government, exposes the state to a declaration of war. If war actually results, the punishment is increased to transportation. The second article punishes with banishment any acts of a subject calculated to expose Frenchmen to reprisals. The precise acts which are so punishable are left to judicial determination; and thus far but three cases have arisen in which the laws were regarded as applicable. The responsibility of making suitable regulation on the subject of neutrality rests, in France, upon the government, and is usually made the subject of proclamation, whenever the outbreak of war makes it necessary for France to assume an attitude of neutrality. The task of the government in this respect is made easy of performance by the fact that the manufacture and sale of the most offensive forms of contraband of war, such as powder, fire-arms, ammunition, and projectiles, are made the subject of state regulation. It is, therefore, not difficult for the government, at the outbreak of war, to impose such additional restrictions upon the manufacture and sale of contraband articles as will effectually prevent violations of its neutrality. The absence of positive law on the subject enables France to adapt its neutrality regulations to the standard of international law at any particular epoch—

an advantage which is shared by all of the highly centralized governments on the continent of Europe. The law and practice of Belgium, Brazil, Italy, Holland, Russia, Spain, and Portugal are similar to those of France. Austria and Prussia have no laws upon the subject, and seem to need none, as ample powers to prevent violations of neutrality are vested in the respective governments. The laws of Denmark and Sweden are quite elaborate, resembling in many respects those of England and the United States.[1]

The "Droit d'Angarie." Although this right has been somewhat less frequently exercised in recent times than was formerly the case, it is still recognized at international law as a lawful restraint upon neutral commerce. In its exercise it resembles, in some respects, the right of embargo which has already been explained,[2] and authorizes a belligerent, in an emergency of war, to apply neutral property to a hostile use; the neutral owner being compensated, in every case, for the property thus involuntarily appropriated to the military use of a belligerent. The most frequent form of appropriation, in former times, consisted in the taking of neutral merchant ships, which "were compelled to transport soldiers, ammunition, or other instruments of war; in other words, to become parties against their will to carrying on direct hostilities against a power with whom they were at peace."[3] During the Franco-Prussian War the right was exercised, in an extreme form, by the Prussian Government, which caused several British merchant vessels to be seized and sunk at the mouth of the Seine, with a view to prevent the egress of certain French gunboats from that river. This act gave rise to a demand for indemnity

[1] Report of English Neutrality Laws Commission of 1870, p. 40.

[2] Page 266 *ante*.

[3] III Phillimore, pp. 49–53; I Azuni, Maritime Law of Europe, pp. 238–242; III Calvo, § 1277; IV Ibid. §§ 2242-2249; Heffter, § 150, note; II Ferguson, § 251; Lawrence, Int. Law, § 252; Dana's Wheaton, § 293, note 152; Hall, § 278; Woolsey, § 118, note; IV Hautefeuille, p. 439; Lawrence's Wheaton, p. 511, note 169; I Massé, p. 280; Risley, p. 139; I Guelle, pp. 62, 63. For discussions of the derivation of the term and the former extent of the right, see II Ferguson, § 251, note; Woolsey, § 118, note.

on the part of the British Government, which was promptly acceded to by Prussia.[1]

Although the right, as formerly exercised, exhibits a tendency to become extinguished by non-user, its application to international telegraphs and telephones, to the rolling-stock of railways and other neutral property, bids fair to come into especial prominence in the wars of the future. Indeed, the rules agreed to by the International Peace Conference at The Hague contain provisions regulating the use of railway material, telegraphs, and the like, by belligerents in the prosecution of their military operations.[2]

References. For the old view of neutrality the student is referred to Vattel, liv. iii. chap. vii. §§ 103–111; Azuni, "Maritime Law," vol. ii. chaps. i.–v. For the views now generally accepted, see Hall, pt. iv. chaps. ii.–iv.; Boyd's Wheaton, §§ 405–501; II Halleck, chaps. xxiv. xxviii.; Creasy, pp. 570–683; Lawrence, "International Law," §§ 243–268; IV Calvo, §§ 2491–2707; II Lorimer, pp. 121–129; II Twiss, §§ 208–240; Walker, "Science of International Law," pp. 374–526; II Ortolan, pp. 77–83; Manning, bk. v. chaps. i.–vi. viii.–xii.; III Phillimore, pp. 225–386; Woolsey, §§ 163–192; Bernard, "The Neutrality of England"; Nys, "La Guerre Maritime," chaps. i. ii. vi.; Glass, "Marine International Law," pp. 573–603; II G. F. De Martens, §§ 305–314, 323–326; Klüber, §§ 279–287, 299–316; Heffter, pp. 269–286; Kusserow, "Les Devoirs d'un Gouvernement Neutre"; and I Hautefeuille, pp. 195–407; vol. ii. pp. 1–69, 289–462; vol. iii. pp. 214–276, 432–449. For a discussion of the *Alabama* Case and the Geneva Arbitration, see Bernard, "Neutrality of England"; Cushing, "Treaty of Washington"; "The *Alabama* Question," by Professor Bluntschli, vol. ii. "Revue de Droit International," pp. 452–485; see, also, vol. i. Ibid. pp. 153, 449; vol. ii. Ibid. p. 142; vol. iii. Ibid. p. 115; vol. iv. Ibid. p. 127; vol. vi. Ibid. pp. 453–581; vol. vii. Ibid. pp. 70, 127; "The Geneva Arbitration," vols. i.–iv.; "Foreign Relations of the United States," 1872; IV Calvo, §§ 2558–2591; III Phillimore, pp. 250–273; Hall, §§ 222–229; Gessner, "Sur la Réforme du Droit Maritime de la Guerre," in vol. viii. of "Revue de Droit International";

[1] Hall, § 278; III Phillimore, pp. 49–53.

[2] See, in Appendix E, pars. 53 and 54 of the Rules of War on Land adopted by the International Peace Conference on July 29, 1899.

and Lorimer, "The Obligations of Neutrals." For discussions respecting the neutrality of telegraphs, telephones, and ship-canals, see the articles by Sir Travers Twiss, in vol. vii. "Revue de Droit International," pp. 682–694; vol. xiv. Ibid. pp. 572–583; by M. T. M. C. Asser, in vol. xx. "Revue de Droit International," pp. 529–558; by Professor L. von Stein, vol. xvii. Ibid. p. 332; vol. xix. Ibid. pp. 118, 164; by M. G. Moynier, vol. xx. Ibid. pp. 312; by Dr. J. C. Buzzati, vol. xx. Ibid. pp. 383, 606; see, also, vol. viii. of the "Annuaire de l'Institut de Droit International," p. 179.

CHAPTER XIII

CONTRABAND OF WAR

Restrictions upon Neutral Commerce in Time of War. The law of nations permits a belligerent to exercise a peculiar jurisdiction over neutral commerce in time of war. This jurisdiction is so extensive in some respects as to amount to an absolute prohibition of certain kinds of trade; it is limited, indeed, in its extent and operation, only by the zeal and energy which belligerents display in its exercise. This jurisdiction extends—

(*a.*) To the prohibition of neutral trade with belligerents in certain articles susceptible of military use. The articles so forbidden to be transported are called *contraband of war.*

(*b.*) To the prohibition of all trade with certain ports or places, which are closed to such trade by an exercise of military force known as an *investment*, *siege*, or *blockade.*

(*c.*) To make these prohibitions effective, a belligerent is given the right to stop and search all neutral merchant vessels on the high seas, in his own territorial waters, or those of the enemy, for the purpose of determining the nationality of ships and goods, and of ascertaining whether they contain enemies' goods, contraband of war, or are destined to a port of the enemy against which a blockade has been established. This is called the *belligerent right of search.*

When and by Whom Exercised: Penalty. These rights pertain to belligerent states alone. They come into existence at the outbreak of war, and are terminated by the treaty of peace. None of them exist, or may lawfully be exercised, in time of peace; indeed, the enforcement of any one of them, during

peace, would be regarded as a just cause for war by the state whose sovereign rights were injured by its exercise.[1]

International law declares the acts of transporting contraband and breach of blockade to be unlawful, and denounces the penalty of confiscation upon the goods, and, in some cases, upon the ships engaged in such illicit trade. These rules of international law are enforced by the belligerent who suffers by their violation, and the authorized penalties are imposed by his prize-courts.[2]

Application to Individuals. The rules of international law on the subject of contraband trade and breach of blockade are directed chiefly against the acts of individuals. If a neutral state, in its corporate capacity, were to engage in contraband trade, it would be regarded as an act of hostility by the injured state, and would result in a declaration of war. An individual engaging in such trade does so at the risk of losing the articles of merchandise which constitute his commercial venture. He does not involve his government, however, in the breach of neutrality of which he is himself guilty. If, however, the municipal law of his own state forbids its subjects to take part in contraband trade, he may be punished by that government for a violation of its laws.

Origin of the Practice. The principle of forbidding, as a matter of state policy, the manufacture or sale of certain articles, or even the holding of them in legal possession, has been recognized by the municipal law of all states since the beginning of history. The origin of the rule of international

[1] V Calvo, § 2708; II Twiss, § 121; Bluntschli, § 765; Klüber, §§ 289, 290; Hall, §§ 232–235; Vattel, liv. iii. chap. vii. §§ 111–118.

[2] According to the modern law of nations—for there has been some relaxation in practice from the strictness of the ancient rules—the carriage of contraband goods to the enemy subjects them, if captured *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter only when there has been some actual co-operation, on their part, in a meditated fraud upon the belligerents, by covering up the fraud under false papers, and with a false destination. — Carrington *vs.* Merchants, Ins. Co., 8 Peters, 495.

law on the subject of contraband of war, however, is relatively recent, and, in its present form, does not antedate the seventeenth century.[1]

The commercial cities of the Mediterranean had but little interest in asserting such a right against each other, since each of them claimed exclusive control over what it regarded as its own field of commerce, and was not disposed to surrender any portion of it, even in time of war. Moreover, a large part of their trade with the East, especially that of Venice and Genoa, was in articles which would now be regarded as contraband of war. It is, therefore, very unlikely that they would have advocated, or even favorably considered, a principle the application of which would have seriously injured, if it did not entirely destroy, a most lucrative branch of their commerce. The adoption of the modern rule was thus deferred until the northern and western European powers had begun to acquire maritime importance, and to carry on hostile undertakings against each other at sea.

So soon as interstate commerce became general it was seen that certain kinds of trade, if carried on during the existence of a war, were calculated to injure belligerents to such an extent as to make it necessary for them to cause, at least, their temporary discontinuance; and to justify them, in the exercise of the right of self-defence, in resorting to such measures of precaution as would neutralize their injurious effects. It was not difficult to find a remedy, when the trade complained of was carried on by a state in its corporate capacity, since it constituted a violation of neutrality, and was punishable as such.

[1] So early as the thirteenth century it had become the usage for powerful sovereigns to forbid *all* trade with their enemies in time of war. Such an instance occurs in a treaty of Edward III. of England with the Flemings, in 1370. Francis I., in 1543, forbade his allies and confederates to deliver munitions of war to his enemy. Grotius was the first writer of standard authority to discuss the subject. Although the transport of certain articles is forbidden in treaties of an earlier date, the Treaty of the Pyrenees, in 1659, and that of Utrecht, of 1713, seem to have been most effective in determining the present rule on the subject of contraband of war. See, also, V Calvo, §§ 2708–2715; II Twiss, § 121; Heffter, § 158; Hall, §§ 236–240.

Where the objectionable commercial undertakings originated with individuals, however, it was less easy to provide a remedy. On land it was soon found to be impossible to prevent contraband trade, unless the belligerent himself controlled the neutral frontier, or the neutral state was willing to resort to such elaborate police measures as would effectively prevent the conveyance of contraband articles across its boundaries. Its attempted regulation on land, therefore, was soon abandoned. At sea, however, the matter could be more easily regulated. The ships of neutrals could be searched, and, if contraband articles were found on board, a suitable penalty could be inflicted; or their introduction into the enemy's country could be prevented by maintaining opposite his coasts a naval force of sufficient strength to make it difficult, or impossible, for neutral ships to obtain access to his harbors.

When such regulation was first undertaken, the attempt was made to forbid all traffic with an enemy. This claim, however, was soon abandoned, and the conveyance of contraband was regarded as a criminal act, involving the *persons* engaged in it, as well as their property, in the penalties imposed. In this form the rule was recognized by Grotius. The criminal feature was soon abandoned, so far as it affected the personal rights of those concerned, and the penalties were restricted to the contraband goods alone.

What Constitutes Contraband. In determining whether a particular article is or is not contraband of war, three elements must be considered in reaching a decision as to its liability to condemnation: (*a*) the place of its capture; (*b*) its destination; (*c*) the character of the article and the use to which it may be applied. The first two are not difficult to determine. The article must be captured on the high seas, or in the territorial waters of either belligerent; and it must have a hostile destination—that is, it must be destined to the military use of a belligerent.[1] As to the article itself, it is difficult to

[1] "Goods of every description may be conveyed to neutral ports from neutral ports, if intended for actual discharge at a neutral port, and to be brought into the common stock of merchandise of such port; but

lay down a rule the application of which shall, in every case, determine whether a particular article is, or is not, contraband of war. The attempt has frequently been made, but none of the rules suggested has, as yet, received that general sanction which is necessary to give it standing as a rule of international law. "Grotius, in considering this subject, makes a distinction between those things which are useful only for purposes of war, those which are not so, and those which are susceptible of indiscriminate use in war and peace. The *first* he agrees with all other text writers in prohibiting neutrals from carrying to the enemy, as well as in permitting the *second* to be so carried the *third* class—such as money, provisions, ships' and naval[2] stores — he sometimes prohibits and at other times permits, according to the existing circumstances of the war."[1]

The question as to what is and what is not contraband cannot, as yet, be answered with precision. No complete list of articles which are to be deemed contraband under all circumstances has been drawn up, nor does it seem likely that it ever will be. That which is contraband under certain circumstances may not be so under others. The main point, in case of an article of doubtful use, is, whether it was intended for, or would probably be applied to, military purposes. The release or condemnation of the goods is, in every case, determined by

voyages from neutral ports intended for belligerent ports are not protected in respect to seizure, either of ship or cargo, by an intention, real or pretended, to touch at intermediate neutral ports."— The *Bermuda*, 3 Wallace, 514. "Neutrals may convey to belligerent ports not under blockade whatever belligerents may desire to take, except contraband of war, which is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect; such seizure, however, is restricted to actual contraband, and does not extend to the ship or other cargo, except in cases of fraud or bad faith on the part of the owners, or of the master with their sanction."—Ibid.

[1] Boyd's Wheaton, pp. 558, 559, citing Grotius, De Jure Belli et Pac. lib. iii. cap. i. § v. 1, 2, 3. The views of Bynkershoek and Vattel agree in substance with those of Grotius. The former, however, shows an inclination to extend Grotius's rules in the interest of belligerents, while the latter contends for a rule somewhat more favorable to neutrals. See Vattel, bk. iii. chap. vii. §§ 112, 113; Bynkershoek, Quest. Jur. Pub. lib. i. cap. 10.

the decision of this question. Contraband of war may be defined, however, in general terms, as any article primarily intended for the military or naval use of a belligerent and constituting, wholly or in part, the cargo of a neutral merchant vessel found on the high seas or in the territorial waters of a belligerent and having a hostile destination.[1]

Field's Rule. Mr. Field, in his proposed International Code, holds that "private property of any person whomsoever, and public property of a neutral nation, are contraband of war when consisting of articles manufactured for, and primarily used for, military purposes in time of war, and actually destined for the use of the hostile nation in war, but not otherwise."[2]

Question Determined by Prize-Courts. In England and America the court before which the goods are brought will inquire into all the circumstances of the case; such as the destination of the ship, the purpose to which the goods seem intended to be applied, the character of the war, and so on, and will condemn or release them upon the evidence. If, however, there are any treaty stipulations on the subject, or if the state before whose court the goods are brought has issued any definite list of contraband goods, the decision will, of course, be regulated accordingly. "The liability to capture," says Halleck, "can only be determined by the rules of international law, as interpreted and applied by the tribunals of the belligerent state, to the operations of whose cruisers the neutral merchant is exposed."[3]

Opinion of the Supreme Court of the United States. The most recent authoritative opinion upon the subject, and the one which more nearly expresses the existing rule than any other, is that laid down by the Supreme Court of the United

[1] V Calvo, § 2708; II Twiss, § 121; II Halleck, pp. 244, 245; Hall, §§ 236–246; Dana's Wheaton, p. 629, note 226; II Ortolan, pp. 182–200.

[2] Field, Int. Code, § 859.

[3] Boyd's Wheaton, pp. 575, 576; Halleck, chap. xxxii. § 19. See, also, on page 576 of the former work, the lists of contraband as determined by the English prize-courts. Dana's Wheaton, § 501, note 226; V Calvo, §§ 2708–2738; Holmes's Kent, pp. 136–143.

States in the case of the *Peterhoff*. The decision of the court was that "the classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is, perhaps, impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes: (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war. (2) Articles which may be, and are, used for purposes of war or peace, according to circumstances. (3) Articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege." [1]

To these may be added the rule that no articles of merchandise are contraband of war so long as they remain in neutral territory, or are found on the high seas with a *bona fide* neutral destination. They acquire the character of contraband only when they are found, without the territorial waters of a neutral state, on board a ship which is destined to a hostile port.

Application of the Rules. In the application of these rules, the first and third give rise to but little difficulty. Such discussion as has been had, with respect to the liability of merchandise to capture as contraband of war, has had to do chiefly with the second class, with reference to which there is a wide difference of opinion.[2] This is observable, not only in the

[1] The *Peterhoff*, 5 Wallace, 58; III Phillimore, §§ 236, 243–253; Vattel, liv. iii. chap. vii. § 112; II Twiss, §§ 121–148; II Ortolan, pp. 182–197; Lawrence, Int. Law, § 278; Klüber, § 288; Manning, pp. 352–377; II Parsons, Maritime Law, pp. 93, 94; Upton, Maritime Law, pp. 327–334; Heffter, § 160; Dana's Wheaton, § 501, note 226; Lawrence's Wheaton, p. 796, note 229; Bluntschli, § 765; III Dig. Int. Law, §§ 368–374.

[2] "The classification of goods as contraband or not contraband, which is best supported by Amer-

policy of states, but in the views of text writers. Those states which, at different periods, have enjoyed great maritime power, both in a commercial and a military sense, have usually advocated an extension of the list of contraband; while, on the other hand, those which have never attained to any considerable degree of maritime importance have opposed such an extension, and have contended for the greatest freedom of neutral trade. Of the former class England is the most conspicuous representative; next in order follow France and the United States. Holland, when an important maritime power, entertained a different view from that advocated by her when her maritime importance had been largely diminished.

Again, articles which are in dispute are differently regarded at different times, and under different circumstances of destination, as determined by the states which are parties to a particular war. So, too, articles which are undeniably contraband at a particular epoch gradually lose that character; on the other hand, articles formerly innocent, with the lapse of time and the march of improvement, acquire the character of contraband.[1] Parts of marine steam machinery, previous to 1830, would have escaped capture. Plates of iron or steel, of suitable size for use as armor, would have enjoyed a similar immunity. At present both are everywhere regarded as contra-

ican and English decisions, divides all merchandise into three classes: (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war. (2) Articles which may be and are used for purposes of war or peace, according to circumstances. (3) Articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege." — The *Peterhoff*, 5 Wallace, 58.

[1] "Money, silver-plate, and bullion, when destined for hostile use, or for the purchase of hostile supplies, are contraband of war. In this case the determination of the question whether such articles, part of the outward-bound cargo of the vessel, were contraband devolved upon the commanding general."—United States *vs.* Dickelman, 92 U. S. 520; III Dig. Int. Law, §§ 368–373.

band of war. However difficult it may be to prepare a list of contraband articles at any particular epoch, it is certainly much less difficult for a court to determine whether a certain article of captured merchandise is, or is not, contraband. In reaching such a determination the court takes into account the circumstances of capture, the necessities of the state to whose use it was destined, its condition, origin, and ownership. With these data the court is usually able to determine, with great accuracy, whether a particular article is, or is not, contraband of war.[1]

Destination Important: How Determined. From what has been said in respect to the right of belligerents to impose restrictions on neutral commerce, it will be seen that, in determining liability to capture, the destination of the vessel and

[1] The action of the court in the case of the *Peterhoff* may be cited as an example. A portion of the cargo of the ship consisted of stoutly made shoes and cavalry boots. The ostensible destination of the cargo was Matamoras, a Mexican port. These articles were notoriously not worn or used, in Mexico, by any portion of the population; they were worn in the United States, and were especially needed for the equipment of the Confederate armies. Another portion of the cargo was composed of heavy woollen blankets, not adapted to the Mexican market, and of a kind entirely different, in pattern and weight, from those usually worn in Mexico. On the other hand, they closely resembled those made and sold, for military use, in the United States, and were adapted to the colder climate of that country. The court, in both instances, properly inferred that the goods were destined to the military service of the Confederacy. In the cargo of the *Springbok* a large quantity of gray cloth and metal buttons was found. The cloth was a heavy woollen material, altogether unsuited to the Nassau market, or for use in the manufacture of clothing in that climate. On the other hand, it was of the same color and quality as that officially adopted for the use of the Confederate armies. Some of the buttons bore as a device the letter C; others the letter A; others the letter I; still others the letters CSN. These buttons were not usual articles of commerce in Nassau, the ostensible destination of the ship. The Confederate army regulations prescribed that such buttons should be worn by, and should designate the uniforms of, its cavalry, artillery, and infantry. Its naval regulations prescribed the use of buttons bearing the letters CSN. Goods bearing the name of the same makers, and in some cases of the same shippers, had been found and condemned in previous cargoes of contraband. These facts created a presumption against the articles, which the claimants did not attempt to rebut by evidence of a legitimate neutral destination. — The *Peterhoff*, 5 Wallace, 58; the *Springbok*, Ibid. 1. See, also, Dana's Wheaton, p. 632, note.

the character of the cargo are of the highest importance. As the trade of neutrals with each other undergoes no restriction in time of war, a neutral merchant vessel found on the high seas with a *bona fide* neutral destination is exempt from seizure or detention; it is only when the ship's papers indicate an immediate or ultimate hostile destination that she becomes liable to capture and condemnation.[1] The port from which the ship sails is called her *port of origin;* that to which she is finally destined at the completion of her voyage is called her *port of ultimate destination;* ports at which she touches between these terminal points are called *ports of call* or of *immediate destination.* The destination of a vessel is determined from its papers. If the ultimate destination and all intermediate ports of call are neutral, the ship is said to have a neutral destination. If the port of final destination or any intermediate port of call be hostile, then her destination is hostile. If the purpose of the master to visit an intermediate hostile port be contingent only, and if he has abandoned his purpose in the course of the voyage, the burden of proof is with him to establish such abandonment of the hostile destination. In this case he will have to overthrow the presumption, as to destination, which is created by the ship's papers.[2]

[1] "No trade honestly carried on between neutral ports, whether of the same or of different nations, can be lawfully interrupted by belligerents, but good faith must preside over such commerce; enemy commerce under neutral disguises has no claim to neutral immunity." — The *Bermuda,* 3 Wallace, 514. "Goods of every description may be conveyed to neutral ports from neutral ports, if intended for actual discharge at a neutral port, and to be brought into the common stock of merchandise of such port; but voyages from neutral ports intended for belligerent ports are not protected in respect to seizure, either of ship or cargo, by an intention, real or pretended, to touch at intermediate neutral ports." — Ibid. The *Imanuel,* 2 Rob. 198.

[2] "Neutrals may convey to belligerent ports not under blockade whatever belligerents may desire to take, except contraband of war, which is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect; such seizure, however, is restricted to actual contraband, and does not extend to the ship or other cargo, except in cases of fraud or bad faith on the part of the owners, or of the master with their sanction. Vessels conveying contraband cargo to belligerent ports not under block-

The destination of the goods is usually, but not invariably, determined from that of the ship. If the destination of the ship be neutral, that of the goods is neutral; if it be hostile, that of the goods is hostile. Until the American Civil War the presumption by which the destination of the goods was deduced from that of the ship was generally regarded as conclusive. During the course of that war, however, the Supreme Court of the United States rendered several decisions, the effect of which was to extend considerably the rights of belligerents at the expense of those of neutrals. As the new rule is likely to receive considerable support in future wars, it is important to understand its relation to the old rule of international law upon the same subject. The rule laid down by the court was that the destination of the *goods*, rather than that of the *ship*, was to be inquired into by the court, in determining the liability to capture. If the result of such inquiry showed that the goods were destined to the military use of a belligerent, they were held liable to condemnation,

ade, under circumstances of fraud or bad faith, are liable to seizure and condemnation from the commencement to the end of the voyage." —The *Bermuda*, 3 Wallace, 514. "The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade. The conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea."—The *Peterhoff*, 5 Wallace, 28. "Vessels conveying contraband cargo to belligerent ports not under blockade, under circumstances of fraud or bad faith, or cargo of any description to belligerent ports under blockade, are liable to seizure and condemnation from the commencement to the end of the voyage." —The *Bermuda*, 3 Wallace, 514. "A voyage from a neutral port to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports; and whether it be performed by one vessel or several employed in the same transaction and in the accomplishment of the same purpose."—Ibid. "The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea."—The *Peterhoff*, 5 Wallace, 28. See, also, the *Jonge Pieter*, 4 Robinson, Adm. Rep. p. 79; the *Freundschaft*, Ibid. p. 96; the *Jungfrau Charlotta*, 1 Acton, Adm. Rep. p. 171; the *Maria*, 5 Robinson, 365; the *Polly*, 2 Ibid. 361; the *Imanuel*, Ibid. 197.

even though they were ostensibly destined to a neutral port. The application of the rule is illustrated by the cases of the *Springbok* and *Peterhoff*.

Case of the "Springbok." The *Springbok* was a neutral ship of English ownership, which sailed from London in December, 1862, having on board a cargo made up in great part of contraband of war. The destination of the vessel, as indicated by her custom-house certificate, certificate of clearance, and manifest of cargo, was Nassau, N. P., a British, and therefore neutral, port. On February 3, 1863, she was captured by a public armed vessel of the United States, on the high seas, about one hundred and fifty miles east of her port of destination. She was conveyed to New York as a prize, and ship and cargo were there condemned by the United States District Court, a tribunal having original jurisdiction in the case. An appeal was taken to the Supreme Court, where the decree was reversed as to the ship, but affirmed as to the cargo. The decision of the court with regard to the ship was that, when "the papers of a vessel sailing under a charter party are all genuine and regular, and show a voyage between ports neutral within the meaning of international law, and when the aspects of the case generally are, as respects the vessel, otherwise fair, the vessel will not be condemned because the neutral port to which it is sailing has been constantly and notoriously used as a port of call and transshipment by persons engaged in the systematic violation of blockade, and in the conveyance of contraband of war, and was meant by the owners of the cargo carried on this ship to be so used in regard to it."[1] The *Springbok* was held to come within the rule. "Her papers were regular, and they all showed that the voyage in which she was captured was from London to Nassau, both neutral ports within the definition of neutrality furnished by international law. The papers, too, were all genuine, and there was no concealment of any of them, and no spoliation. Her owners were neutral, and do not appear to have

[1] The *Springbok*, 5 Wallace, 1.

had any interest in the cargo; and there is no sufficient proof that they had any knowledge of its alleged unlawful destination."[1]

The case of the cargo was quite different. The cargo of the ship consisted of over two thousand packages. Of these the bills of lading disclosed the contents of less than one-third, and concealed the contents of over two-thirds, of the entire cargo. The manifest and bills of lading named no consignee, but described the cargo as deliverable to order. The real owners of the cargo were found to be certain firms in London, all of whom had been the owners of similar packages of merchandise which had been captured on a previous occasion, and condemned as contraband.[2] The court inferred from these facts the intention of concealing from the scrutiny of American cruisers the contraband character of a considerable part of the cargo. The motive of such concealment being "the apprehension of the claimants that the disclosure of their names, as owners, would lead to the seizure of the ship in order to the condemnation of the cargo."

The concealments above mentioned were not of themselves regarded by the court as sufficient to warrant the condemnation of the cargo. "If the real intention of the owners of the cargo was that the cargo should be unloaded at Nassau, and incorporated by real sale into the common stock of that island," the cargo should have been "restored, notwithstanding the misconduct of concealment. What, then, was the real intention?" This was inferred by the court in part from the ship's papers and in part from the character of the cargo. The manifest and bills of lading showed that the consignment was to order. This was regarded by the court as a negation that any sale was made, or intended to be made, at Nassau. The final destination of the cargo, therefore, was not Nassau, but some ulterior port, and must be inferred from the character of the cargo. A small part of this cargo consisted of arti-

[1] The *Springbok*, 5 Wallace, 1.
[2] The *Gertrude*, Blatchford's Prize Cases (U. S. Dist. Court), 374; the *Stephen Hart*, Ibid. 387.

cles which were contraband by the narrowest definition of the term. A considerable part consisted of articles useful and necessary in war — such as army cloth, blankets, boots and shoes—and therefore contraband within the construction of English and American prize-courts. These being contraband, the residue of the cargo, belonging to the same owners, was included in the decree of condemnation.[1]

Case of the "Peterhoff." The case of the *Peterhoff* resembles, in some respects, that of the *Springbok*. The *Peterhoff* was a steamer which sailed from London with proper documents and ship's papers, indicating her destination to be Matamoras, Mexico. The Rio Grande, for a portion of its course, separates the territory of the United States from that of Mexico. The city of Matamoras is situated on the lower waters of the river, about forty miles from its mouth, and directly opposite the city of Brownsville, in the United States. The *Peterhoff* never reached her destination, but was captured, near the island of St. Thomas, by the United States steamer *Vanderbilt*, on suspicion that her destination was the blockaded coast of the states in rebellion, and that her cargo consisted in part of contraband of war. She was taken to New York, where ship and cargo were condemned as prize. An appeal was taken to the Supreme Court by claimants interested in the vessel and a portion of the cargo.

The court, in reaching a decision, found it necessary to pass upon the question of the right of a belligerent to blockade a boundary river, in order to determine whether the ship was liable for breach of blockade or for carrying contraband of war.

Upon this point the ruling was that, when a navigable river separates two sovereign states, neither belligerent, in the exercise of his right of blockade, can interrupt commerce with the other state, if neutral, by preventing access to any ports of such neutral state as are situated upon the boundary river at

[1] The *Springbok*, 5 Wallace, 1; V Calvo, §§ 2762–2766; vol. vii. Revue de Droit International, pp. 241–258; vol. xiv. Ibid. pp. 328–331; Hall, pp. 673, 674, note; III Dig. Int. Law, § 375.

any point of its course. As the *bona fide* destination of the ship, as indicated by its papers, was Matamoras, a neutral port, it was therefore decided that the ship was not, and, under the circumstances, could not be, liable to condemnation for breach of blockade.

As to the cargo, the decision was that the destination of such part of it as was contraband of war, according to the rules already cited, was not the neutral port of Matamoras, and "that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville and other places in the vicinity. Contraband merchandise is subject to a different rule in respect to ulterior destination from that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former, when destined to a hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents, in articles not contraband, is absolutely free, except interrupted by a blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles not contraband might be sent to Matamoras and beyond to the rebel region, where the communication was not interrupted by blockade, articles of a contraband character, destined in fact to a state in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined for Matamoras."[1] The rule that the ownership of a portion of the contraband cargo rendered articles not contraband, but belonging to the same owners, liable to condemnation was enforced as in the case of the *Springbok*.[2]

Penalty for Contraband Trade. The conveyance of contraband of war is an offence against the law of nations. Over this offence the prize-courts of a belligerent are given jurisdiction, and, in the decision of prize cases, these courts apply the

[1] The *Peterhoff*, 5 Wallace, 35.

[2] The English cases of the *Stert*, 4 Robinson, Admiralty Reports, p. 65, and the *Jonge Pieter*, 4 Ibid. pp. 79, 85, were cited by the court as precedents applicable to the case.

rules and impose the penalties which are sanctioned by international law.

The invariable penalty imposed for the carriage of contraband is that of forfeiture. In ordinary cases this penalty is applied to the contraband goods alone, and to the freight due upon them to the neutral carrier.[1] The question as to whether it is to be extended to other parts of the cargo or to the ship is determined by the knowledge and intention of their owners, as presumed from the circumstances of the case. The ancient penalty for engaging in contraband trade involved the forfeiture of the ship and the non-contraband cargo. This rule has in modern times been relaxed in cases where such contraband articles make up a minor portion of the cargo, thus creating a presumption of innocence in favor of the carrier. In other cases the old presumption remains, and the burden of proof lies upon the owner of the ship to establish his innocence. Such presumption exists, as to the ship—

(*a.*) When the owner of the ship owns any part of the contraband cargo. If a part owner of the vessel be shown to have an interest in the contraband cargo, his share only is forfeited.[2]

(*b.*) When the greater part of the cargo is contraband. In this case the presumption is that the owner of the ship knew of the use to which his property was put, and consented to such illegal use.[3]

[1] Dana's Wheaton, p. 663, note 230. "According to the modern law of nations—for there has been some relaxation in practice from the strictness of the ancient rules—the carriage of contraband goods to the enemy subjects them, if captured *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter only when there has been some actual co-operation, on their part, in a meditated fraud upon the belligerents, by covering up the fraud under false papers and with a false destination."—Carrington *vs.* Merchants' Ins. Co. 8 Peters, 495.

[2] Boyd's Wheaton, p. 584. "Contraband articles contaminate the parts not contraband of a cargo if belonging to the same owner, and the non-contraband must share the fate of the contraband."—The *Peterhoff*, 5 Wallace, 59; the *Ringende Jacob*, 1 Robinson, Adm. Rep. pp. 89, 91; the *Neutralität*, 3 Ibid. p. 296; Hall, § 247; III Phillimore. § 275.

[3] III Phillimore, §§ 275, 276; the

(*c.*) When fraud or deceit is attempted by concealment, or by the use of false papers, or when a false destination is claimed.[1]

(*d.*) When contraband is carried in violation of treaty stipulation.[2]

Rule as to Innocent Cargo. The innocent cargo is exempt from forfeiture unless its ownership is the same as that of the whole or a part of the contraband.[3]

The offence of carrying contraband begins so soon as the ship passes into the high seas from the territorial waters of the neutral state. It is complete, and the liability to penalty no longer exists, when the articles have been delivered at their hostile destination. A ship cannot be captured on its return voyage, since there is no offence against international law in carrying a cargo of any character from a belligerent to a neutral destination.[4]

Release of Neutral Ship upon the Surrender of Contraband Cargo. In a few instances neutral ships have been released, and allowed to proceed to their destination, on condition that the contraband articles be surrendered to the captor. Al-

Bermuda, 3 Wallace, 555; II Halleck, pp. 245–247; Dana's Wheaton, p. 663, note 230.

[1] The *Baltic*, 1 Acton, Adm. Rep. p. 25; the *Margaret*, Ibid. p. 333; the *Rising Sun*, 2 Robinson, 104; III Phillimore, §§ 275, 276.

[2] The *Concordia*, 1 Robinson, 119; the *Two Brothers*, Ibid. 131; the *Hunter*, 1 Dodson, 481; III Phillimore, §§ 276, 277; Hall, § 247.

[3] Hall, § 247; II Halleck, p. 247; III Phillimore, § 276; Upton, p. 332.

[4] "Generally, when contraband goods have been landed, and the vessel has proceeded on her voyage, neither the vessel nor the remaining cargo is liable to seizure; *aliter*, if the destination and papers are false."—Carrington *vs.* Merchants' Ins. Co., 8 Peters, 495; II Halleck, pp. 248, 249; II Ortolan, chap. vi. "It was held by Sir William Scott, in at least two cases, that the duration of the penalty was prolonged to the end of the return voyage when false papers had been used to evade seizure on the outward voyage. This view is properly questioned by Wheaton, on the ground that there must be a *delictum* at the moment of seizure. To subject the property to confiscation, while the offence no longer continues, would be to extend it indefinitely, not only to the return voyage, but to all future cargoes of the vessel, which would thus never be purified from the contagion communicated by the contraband articles."—Boyd's Wheaton, pp. 584, 585.

though this practice has been recognized in a limited number of treaties, it is entirely opposed to the rule of law upon the subject, and has never received, nor is it likely to receive, general sanction. The surrendered articles must be carried before a prize-court in order to secure a decree of condemnation, upon which alone a valid title can be based. The court, in the absence of the ship's papers, frequently finds itself unable to determine, from lack of evidence, whether the articles are, or are not, contraband of war; and, in the absence of the owner, the master of the ship has no legal power to surrender any portion of his cargo, except in accordance with the laws of war.[1]

The Doctrine of Continuous Voyages. In both of the above cases the doctrine of *continuous voyages*, originated by the English prize-courts at the beginning of this century, was recognized by the court in reaching a decree of condemnation. By this doctrine the ultimate destination of a cargo is held to determine its liability to capture. If such destination is a neutral port, and if the cargo is intended to be sold there, and taken up as a part of the general stock in trade, the cargo is not liable to condemnation. If, however, a neutral port is made a new base of operations, and the goods are intended to be finally delivered at a blockaded port; or if they are contraband of war, and are destined to the ultimate military use of a belligerent, then the alleged neutral destination will not avail. The principle of continuous voyages is thus seen to have been extended by the Supreme Court in its application to the cases of the *Springbok* and *Peterhoff*, although the fundamental principle involved, as announced by Lord Stowell in his original decision, has undergone no material change.[2] The

[1] Dana's Wheaton, p. 663, note 230; III Hautefeuille, p. 274; Treaties and Conventions of the United States, pp. 96, 200, 260, 327; Field, International Code, § 877.

[2] For a full account of the decision of Lord Stowell upon the subject of continuous voyages, see the *Polly*, 2 Robinson, Admiralty Reports, p. 369; the *William*, 5 Ibid. p. 395; and the *Baltic*, 1 Acton, 25; the *Imanuel*, 2 Robinson, 197; the *Maria*, 5 Ibid. 365; the *Flora*, 6 Ibid. 9; the *Ebenezer*, 6 Ibid. 250. See, also, III Phillimore, p. 394. and Boyd's Wheaton, pp. 589–592.

later decision regards the goods if contraband, and destined to an enemy's use, or to a blockaded port, as still liable to capture, even when they were to have been discharged at a neutral port, with a view to reshipment to the belligerent destination.[1]

Difference between the Old and New Rules. The rule thus laid down by the Supreme Court of the United States is undoubtedly at variance with the provisions of international law on the same subject, as they were accepted and understood at the outbreak of the Civil War. Neither has the new rule received that general recognition which it must receive to entitle it to consideration as a rule of international law. The development of steam navigation, however, has been such as greatly to facilitate the operations of blockade-running and carrying of contraband. So important has this development been that a belligerent would now suffer great injury were he to adhere to the old rule on the subject, which received international sanction at a time when maritime commerce was carried on in sailing vessels and before the application of steam to purposes of navigation had become an accepted fact. Some modification of the old rule is, therefore, both just and necessary, in order to place a belligerent in as good a situation as that which he formerly occupied. What that modification is to be can only be deduced from experience, of which a sufficient amount has not yet been acquired to justify such a deduction or to warrant the statement of a modified rule. This much only is clear: A powerful belligerent will not, in the future, allow himself to

[1] In the case of the *Springbok* the British Government was applied to by the owners of the contraband cargo to demand restitution of the goods from the American Government, or compensation for their seizure. The case was referred to the law officers of the crown, and their opinion was that the seizure was illegal. The case was referred to a mixed commission, and the claim was rejected, but no reason was given by the commission for its decision. See Creasy, pp. 619, 620, for a full and able discussion of the subject. See, also, Field's International Code, § 859; the *Jonge Pieter*, 4 Robinson, Adm. Rep. p. 79; the *Maria*, 5 Ibid. p. 365; the *Freundschaft*, 4 Ibid. p. 96; the *Polly*, 2 Ibid. p. 361; the *Carl Walter*, 4 Ibid. p. 207; the *Mercury*, 1 Ibid. p. 80; 4 Ibid. app. A; Dana's Wheaton, p. 667, note 231.

be injured by articles of contraband which the enemy actually receives from ships having an ostensibly neutral destination; nor, on the other hand, will a powerful neutral allow the property of his subjects to be seized on the high seas when those goods, although partaking of the character of contraband, have a *bona fide* neutral destination. In the cases above cited the ultimate destination of the goods was so clearly hostile as to make it difficult, if not impossible, for the British Government to maintain the position that the goods of its subjects had been seized in the prosecution of an entirely innocent voyage, and were so entitled to the protection which that government invariably accords to its subjects when their rights have been wrongfully invaded by a foreign state.

Occasional Contraband. During the disturbed period intervening between the outbreak of the French Revolution in 1789 and the Treaty of Vienna in 1815, the old usages of international law were subjected to a severe and constant strain. This was due, in part, to the frequency and magnitude of the wars that were carried on, in which, at times, nearly all of the European states were participants; and, in part, to the great disparity that existed in the relative naval and military power of the principal belligerents. During the greater part of this period the military supremacy of France was successfully maintained against every effort to overthrow it by operations on land; on the other hand, the supremacy of England at sea was so firmly established as to secure even more general recognition. As these powers were generally opposed to each other, it is not remarkable that they should have attempted to interpret the rules of war, each in a sense favorable to its own interests; and as the one was strong where the other was weak, neither was able to interpose an effectual check upon the pretensions of the other. The result was that the rules of capture, on land and sea, underwent a considerable modification in the interest of belligerents, and to the prejudice of the rights of neutrals, as those rights were then understood. This influence upon the law of maritime capture was the more powerful from the fact that the northern states of Europe,

and, to a certain extent, the United States as well, entered into general commerce largely as producers of raw materials, which were consumed by the principal belligerents, and so were obliged to find a market in belligerent territory. Thus, while these states were generally neutral, they were not strong enough at sea, even when acting in concert, to assert effectively their views of neutrality, or even to successfully maintain their neutral rights.

Under these circumstances, not only was neutral commerce likely to suffer from any extension of the definition of contraband, but the commercial prosperity of neutral states was made to depend, in no small degree, upon that definition being closely restricted in its application to neutral property. Such an extension was effected by the application of the doctrine of *occasional contraband*, by the English prize-courts, to cargoes of neutral merchandise. According to this rule articles were condemned which had previously either been exempt from seizure, or, if regarded as contraband, had acquired that character only in exceptional cases, where the circumstances pointed clearly to an undoubtedly hostile destination. The articles so condemned were those usually classified as naval stores and provisions; and neutral states resisted the application of the new rule, partly because of the extreme hardship of the case, and partly because it was not, and had never been, generally recognized as a rule of international law.[1]

[1] "By the modern law of nations provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband. Another exception from being treated as contraband is where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir William Scott has observed, in such a case the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus

The English prize-courts admitted the force of the objection and the irregularity of the practice by a somewhat less rigorous application of the new rule, and certain mitigating circumstances were recognized as creating presumptions in favor of innocence. In their application of the modified rule it was held that if the goods were produce of a neutral state, and were shipped, as raw materials, to strictly commercial ports, these facts were allowed to weigh against condemnation and in favor of restoration.[1]

The Rule of Pre-emption. At a later period the original doctrine was still further modified by the adoption of the *rule of pre-emption*, by which the prize-courts, in some cases, decreed the purchase of the cargo at its value at the port of origin, together with freight and demurrage, with a fair mercantile profit, usually ten per cent., instead of condemning it as contraband of war.[2] The rule, as modified, continued to be enforced until the close of the period of the Napoleonic wars. Their justice was not discussed at the Congress of Vienna, and the Treaty of Vienna contained no provisions upon the subject of maritime capture or contraband of war. They never received such general sanction as to entitle them to be accepted as rules of international law. On the other hand, they were objected to from the first, and so seriously as to lead to the formation of alliances to resist their application. They are no longer seriously maintained as rules of international obligation; and it may safely be said that no modern state would permit the property of its subjects to be confiscated by the operation of rules the justice of which it did

commodities."—The *Commercen*, 1 Wheaton, 382 [388]. "Admitting that provisions are not, in general, contraband of war, it is clear that they become so when destined to a port of naval equipment of an enemy, and, *a fortiori*, when destined for the supply of his army."—Maisonnaire *vs.* Keating, 2 Gallison, 335; III Dig. Int. Law, § 370.

[1] The *Jonge Margaretha*, 1 Robinson, Adm. Rep. p. 189; III Phillimore, §§ 249–259.

[2] See Admiralty Instructions of June 8, 1793, and the British Orders in Council of April, 1795; Dana's Wheaton, §§ 485–501, note 226; II Halleck, pp. 261–266.

not recognize, or by the exercise of rights which were not sanctioned by international law.[1]

Neutral Conveyance of Enemy's Troops and Despatches. It has been seen that the conveyance of contraband of war is an offence against the law of nations. A neutral individual who carries contraband to either belligerent assists that belligerent to a greater or less extent, depending upon the character and quantity of the goods transported. A neutral who goes a step further and engages in the transport service of a belligerent renders still more material aid to such belligerent than is afforded by the mere conveyance of contraband, and, by such conveyance of ammunition, provisions, and warlike stores to a belligerent, for the support of his armies in the field, divests himself of his neutral character and acquires that of an enemy, including the liability to capture and condemnation of both ship and cargo.[2] The conveyance of troops and despatches operates still more powerfully to impress the neutral carrier with the enemy character to the extent of causing the ship so engaged to be condemned as prize of war—this because, in point of directness and importance, the service rendered by the conveyance of either is much greater than that afforded by the conveyance of ordinary contraband. The assistance rendered

[1] III Phillimore, §§ 267–270; Manning, pp. 359, 393; V Calvo, §§ 2790–2795; the *Sarah Christina*, 1 Robinson, Adm. Rep. p. 238; the *Haabet*, 2 Ibid. p. 174.

[2] "An attempt has been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the ground that the war of Great Britain against France was a war distinct from that against the United States, and that Swedish subjects had a perfect right to assist the British arms in respect to the former, though not to the latter. Whatever might be the right of the Swedish sovereign, acting under his own authority, we are of opinion that if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It is perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits are conferred upon an enemy, who thereby acquires a greater disposable force to bring into action against us."[a]—*Per J. Story.* The *Commercen*, 1 Wheaton, 382; the *Carolina*, 4 Rob. 256; the *Friendship*, 6 Rob. 420; the *Orosembo*, Ibid. 430.

[a] Chief-justice Marshall strongly dissented from the application of this principle.

to an enemy by a single cargo of munitions of war, though direct and material, is, at best, limited. The mischief that may result from the carriage of a single despatch, or general officer, may have a decisive effect upon the issue of a war. The penalty for engaging in contraband trade usually extends to a forfeiture of the contraband articles. The question as to the ship and non-contraband cargo is made to depend on the guilty knowledge of their owners. If they are forfeited it is because a presumption of such knowledge is created by the fact of ownership. When troops or despatches are carried to a hostile destination, however, the presumption of guilt created by such carriage is so strong as to be regarded as conclusive; and the ship is invariably condemned as the instrument with which the offence against international law has been committed.[1]

Definition of Terms Troops and Despatches. The term *troops* includes not only military persons, but all individuals having an official character in the service of a belligerent, whose assistance is material in the prosecution of the war, or whose detention is calculated to impair his military efficiency.

Despatches are official communications between official persons, in the military or civil service of a state, upon matters connected with the public business. All other communica-

[1] "The general rule that the neutral carrier of enemy's property is entitled to his freight is now too firmly established to admit of discussion; but to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence the carrying of contraband goods to the enemy, the engaging in the coasting or colonial trade of the enemy, the spoliation of papers, and the fraudulent suppression of enemy's interests, have been held to affect the neutral with the forfeiture of freight; and in cases of a more flagrant character, such as carrying despatches or hostile military passengers, an engagement in the transport service of the enemy, or a breach of blockade, the penalty of confiscation of the vessel has also been inflicted."—The *Commercen*, 1 Wheaton, 382; the *Atalanta*, 6 Robinson, Adm. Rep. p. 440; the *Madison*, Edwards, 224; V Calvo, §§ 2796–2826; Hall, §§ 249, 250; III Phillimore, §§ 271–274; Dana's Wheaton, § 502, note 228.

tions, of whatever character, are unofficial, and therefore not subject to classification as despatches.

The Destination Important. In the conveyance of troops and despatches the destination of the vessel is of importance as creating a presumption of guilt or innocence. If the destination is hostile, the guilt of the carrier is presumed; if such destination be neutral, the contrary is the case, and the burden of proof lies on the captor to establish guilty knowledge. If the ports of origin and destination are both hostile, an extreme case of guilt exists; if such ports are both neutral, it is difficult to see how guilty knowledge can be presumed on the part of the neutral carrier. As in every other case of maritime capture, questions as to the character of particular despatches, and the consequent liability of the carrier, are determined by the proper prize-courts.

Cases of the "Friendship" and "Greta." Several condemnations of vessels for carrying troops were made by the English prize-courts during the period between 1803 and 1815. A leading case was that of the *Friendship*, a vessel hired to bring to France eighty-four shipwrecked officers and sailors. It was confiscated because it appeared in the evidence that it was hired as a transport, was not permitted to take cargo, and was being used as a transport to convey these persons, as a part of the French army, to a belligerent destination. In another case a vessel sailed from Rotterdam to Lisbon, where it was ostensibly chartered by a Portuguese subject to carry cargoes or passengers to Macao; no cargo was shipped, but, after some time spent in fitting it for passengers with unusual care, three Dutch officers of rank embarked in it, not for Macao, but for Batavia. Lord Stowell, on the facts in the case, inferred that a contract had been made with the Dutch Government before the vessel left Rotterdam, and condemned it. The *Greta* was a neutral vessel, employed in carrying certain shipwrecked Russian soldiers from a port of Japan to a destination in Asiatic Russia. She was captured by an English cruiser, and condemned. Had she been captured in the act of conveying them from the place of the shipwreck to

any destination, her act, being one of humanity, would have been innocent. In the particular voyage upon which she was engaged, however, she was acting in the capacity of a transport.[1]

Presumption in the Case of Hostile Despatches. In the case of hostile despatches, the mere presence of such documents on board suffices to create a presumption of guilt on the part of the neutral carrier. So severely is this rule applied that a neutral may not even plead compulsion as an excuse, it being held in such a case that his remedy, in the event of being compelled to render such service to a belligerent, is through his own government in the diplomatic way.

Despatches of a Belligerent to its Ministers and Consuls in Neutral States. The despatches of a public minister or consul representing a belligerent in a neutral state are an exception to this rule. "They are despatches from persons who are, in a peculiar manner, the favorite object of the protection of the law of nations, residing in a neutral country for the purpose of preserving the relations of amity between that state and their own government. On this ground a very material distinction arises with respect to the right of furnishing the conveyance. The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you."[2]

Conveyance of Mails in the Ordinary Course of Business. The question of conveying hostile despatches must not be confused with the carriage of mails by a neutral, in accordance with contracts or agreements, and in the way of ordinary business. Such contracts not only have the sanction of municipal law, but are not infrequently made the subjects of treaty stipulation. It is not easy to see how the master of a vessel can acquire any duties or responsibilities in connection with them,

[1] Hall, § 249; the *Friendship*, 6 Robinson, Adm. Rep. p. 421; the *Orozembo*, Ibid. p. 430.

[2] The *Caroline*, 6 Robinson, Adm. Rep. p. 461, cited by Wheaton, p. 581; III Phillimore, § 273; the *Caroline*, 6 Robinson, Adm. Rep. p. 467; the *Madison*, Edwards, 224.

save for their speedy and safe delivery. A neutral master who aids a belligerent by carrying his despatches, with full knowledge of their contents, or under circumstances which create a presumption of such knowledge on his part, is justly held to the fullest responsibility for his act. The conveyance of mails, however, in the usual course of business, can give rise to no such presumption. The packages are delivered to him either locked or sealed. He has, and can have, no knowledge of their contents, much less of the character of the letters enclosed in them. Responsibility for them on the part of the carrier, therefore, cannot exist, for no knowledge or intention can be presumed. The modern tendency is to facilitate mail communication in every way possible, to remove every obstacle to their prompt and safe delivery, and to guarantee, beyond question, the sacredness of private correspondence.[1]

Case of the "Trent." The *Trent* was one of a line of mail steamers employed in general mail and transportation service between Havana and London. On November 7, 1861, she sailed from Havana, having on board, among other passengers, four persons, Messrs. Mason and Slidell, and their secretaries, who were *en route* to Europe, where they were to be employed as diplomatic agents of the Confederate States. On November 8th the *Trent* was stopped on the high seas by the *San Jacinto*, a public armed vessel of the United States, whose commander, Captain Wilkes, sent on board a search-party composed of an officer and a detachment of marines. The two envoys, with their secretaries, were seized by the search-party, taken on board the *San Jacinto*, and conveyed to New York. The *Trent* was then released, and allowed to proceed on her way.

So soon as the facts were brought to the attention of the British Government, a demand was made upon the United States for the restoration of the arrested persons. Their dip-

[1] The rule of international law, however, still authorizes the examination of mails found on board vessels which have been regularly captured. — Field, International Code, § 862; Lushington, Naval Prize Law, introduction, p. xii.

lomatic character was not drawn in question, their surrender being demanded on the ground that they had been forcibly taken from a neutral vessel on the high seas, and in the prosecution of a voyage from one neutral port to another. They were surrendered by the United States upon the ground of the irregularity of their seizure.

Conclusions. The case of the *Trent* illustrates certain principles of the law of maritime capture.

(*a.*) The *Trent*, being a neutral vessel, was liable to search upon the high seas by any properly documented armed vessel in the service of a belligerent power.

(*b.*) If the commander of the searching vessel had found enemy despatches on board, or had reason to believe that such despatches were being carried, it was his duty to seize the vessel and send her to a port of the United States, with a view to a judicial determination of the question involved.

(*c.*) In the exercise of his belligerent right it was his duty to capture the vessel; or release her, after having executed the right of search. No intermediate course was possible. His action, therefore, in seizing certain persons, under any pretext, was without warrant of law.

(*d.*) The destination of the *Trent* was neutral, a fact which should have created a strong presumption of innocence. The fact that her port of origin was also neutral should have made the presumption conclusive as to innocence.[1]

[1] For discussions of this case, see Dana's Wheaton, p. 648, note; Bernard, Neutrality of Great Britain, pp. 157, 225; Nys, La Guerre Maritime, p. 46; V Calvo, §§ 2812–2826; II Halleck, p. 224, note; Snow, Cases in Int. Law, p. 486. The case of Henry Laurens is, in many respects, the same as that of the *Trent*. Mr. Laurens was sent upon a mission to Holland, with the authority of Congress, to secure the recognition of the independence of the colonies and to obtain a loan of money. He left Charleston in 1780, and reached Martinique, in the West Indies, in safety. From there he embarked in a Dutch packet, the *Mercury*, for Holland. He was thus on board a neutral vessel sailing between neutral ports. When three days out the *Mercury* was overhauled by the British ship *Vestal*. Mr. Laurens and his secretary were forcibly removed, their papers were seized, and they were conveyed as prisoners to St. John's, Newfoundland, where they were committed, under a charge of high-treason, to

References. For further information upon this subject the student is referred to Vattel, liv. iii. chap. vii. §§ 112, 113; II Azuni, chap. ii. pp. 144–157; Hall, part iv. chaps. v. vi.; Boyd's Wheaton, §§ 476–508; V Calvo, §§ 2708–2826; Halleck, chap. xxvi.; Manning, book v. chaps. vii. viii.; III Phillimore, pp. 387–472; II Wildman, pp. 210–245; Dahlgren, pp. 65–100; Woolsey, §§ 193–199; Nys, "La Guerre Maritime," chap. iii.; Glass, "Marine International Law," pp. 464–508; II G. F. De Martens, §§ 314–319; II Ortolan, chap. vi.; II Twiss, chap. vii.; Lawrence, "International Law," chap. vi.; Dana's Wheaton, §§ 476–508; Lawrence's Wheaton, §§ 476–508; III Digest of International Law, §§ 368–391; Wheaton, "History of the Law of Nations," pp. 115, 134, 313–401; Klüber, §§ 288–292; Heffter, pp. 296, 304; and II Hautefeuille, pp. 69–189. See, also, the article entitled "Les Droits de la Contrebande de Guerre," by M. R. Kleen, vol. xxv. "Revue de Droit International," pp. 7–34, 132–161, 239–286, 389–409; vol. xxvi. Ibid. pp. 214–218; vol. xxvii. Ibid. pp. 58–75; R. Westlake, vol. ii. Ibid. p. 614.

the Tower of London. After the surrender at Yorktown their status was changed to that of prisoners of war, and Mr. Laurens was eventually exchanged for Lord Cornwallis. — Sparks, Diplomatic Correspondence, vol. ii. p. 461; Upton, Law of Nations Affecting Commerce during War, pp. 360, 361.

CHAPTER XIV

BLOCKADE: BREACH OF BLOCKADE

Nature of the Restriction. The most extensive, and in some respects the most effective, restraint which the law of nations permits a belligerent to impose upon neutral commerce is that involved in the exercise of the right of blockade. The rules of maritime capture permit him to seize upon the high seas certain contraband articles, which are destined to the enemy's use, or are calculated to aid that enemy in his military operations. But non-contraband articles are exempt from seizure, even though they have a belligerent destination, and the ship incurs no liability whatever. By the establishment of a blockade, however, he may not only prevent the introduction of contraband articles, but may absolutely prohibit access to his enemy's coast, and so, for the time, interrupt all commercial intercourse with the outside world.[1]

Definition. The interruption or suspension of neutral commerce which results from the forcible closing of a belligerent's ports or harbors is called a *bloekade*. A belligerent, in the exercise of this right, may choose any port or harbor of his enemy, any portion of his coast line, or any entrance to a river, gulf, or bay, situated entirely within the territorial limits of a hostile state.[2] He may not, however, by the establishment of

[1] II Ortolan, liv. iii. chap. ix. pp. 326, 327; Upton, pp. 275, 276; V Calvo, §§ 2827–2829; Snow, p. 148.

[2] "One belligerent engaged in actual war has a right to blockade the ports of the other, and neutrals are bound to respect that right."— The Prize Cases, 2 Black, 35. "To justify the exercise of this right and legalize the capture of a neutral vessel for violating it, a state of actual war must exist, and the neutral must have knowledge or notice that it is the intention of one belligerent to blockade the ports of the other."— Ibid. To create this and other belligerent rights, as against neutrals, it is not

a naval blockade, attempt to assume control over commerce by land, or deny access to a river, or other navigable water boundary, between the territory of his enemy and that of a neutral.[1] He may prevent access to the blockaded coast by means of ships-of-war or by batteries on land, or, if the circumstances be favorable, both measures may be resorted to. He may, by an investment, blockade a fortified place on land; and this may be done as an incident of siege operations, or with a view to the reduction of the place by cutting off its supplies of food or water. The right of a belligerent to blockade an enemy's port arises from his right to besiege it. The *right* is the same in both cases; the two operations differ in purpose only; in the one case the reduction of the place is the object aimed

necessary that the party claiming them should be at war with a separate and independent power; the parties to a civil war are in the same predicament as two nations who engage in a contest and have recourse to arms."—Ibid.

[1] Hall, § 266; II Ortolan, p. 332. "The mouth of the Rio Grande was not included in the blockade of the ports of the rebel states, set on foot by the National Government during the late rebellion; and neutral commerce with Matamoros, a neutral town on the Mexican side of the river, except in contraband destined to the enemy, was entirely free."—The *Peterhoff*, 5 Wallace, 28. "*Semble*, that a belligerent cannot blockade the mouth of a river occupied on one bank by neutrals with complete rights of navigation."—Ibid. "A neutral, professing to be engaged in trade with a neutral port, under circumstances which warrant close observation by a blockading squadron, must keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the blockading line as to repel, so far as position can repel, all imputation of an intent to break the blockade. Neglect of that duty may well justify capture and sending in for adjudication; though, in the absence of positive evidence that the neglect was wilful, it might not justify a condemnation."—The *Dashing Wave*, 5 Wallace, 170. "A neutral vessel, at anchor, completely laden with a neutral cargo, on the neutral side of a river dividing neutral from hostile water, washing a blockaded coast, was captured as being subject to just suspicion of an intent to break the blockade. The captain of the vessel (who was, however, absent at the time of capture) and the mate, being examined *in preparatorio*, testified that she was in neutral water when captured; a stevedore, yet on board, that she had drifted to the place where she was taken under stress of weather; he not knowing whether, when captured, she was in neutral water or not: Held, that this preliminary testimony warranted restoration."—The *Teresita*, 5 Wallace, 180; The *Frau Ilsabe*, 4 Robinson, Adm. Rep. p. 64; the *Stert*, Ibid. p. 66; the *Jonge Pieter*, Ibid. p. 79; the *Ocean*, 3 Ibid. p. 297.

at; in the other, the interruption of the commercial intercourse.[1]

What is a Valid Blockade? At one time considerable doubt existed as to the manner in which an enemy's ports should be closed, in order to constitute a blockade which should be valid at international law. This was set at rest by the fourth article of the Declaration of Paris, which provides that "a blockade, to be binding, must be effective." To this declaration nearly all the civilized states of the world were signatory parties, and, as the United States has always maintained the principle announced in the declaration, that rule may now be accepted as the existing rule of international law upon the subject.[2]

How Established and Notified. As an attempt to enter a blockaded port is a flagrant violation of international law, involving both ship and cargo in the severest penalties, it is important that official information of its existence should be conveyed to neutrals, in order that they may know when intercourse with the place becomes illegal and their liability to capture begins. This is important, because none but effective blockades are recognized as lawful, and, until a *de facto* blockade is established, neutrals are under no obligation to relinquish their commercial intercourse with an enemy's port. In other words, a neutral vessel incurs no penalty by entering a port which is not actually blockaded by the

[1] "A blockade may be made effectual by batteries on shore as well as by ships afloat, and, in case of an inland port, may be maintained by batteries commanding the river or inlet, by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter."—The *Circassian*, 2 Wallace, 135; V Calvo, §§ 2828–2840; Manning, pp. 402, 403; II Halleck, pp. 212–215; Hall, §§ 257–260; Klüber, § 297; Lawrence, §§ 269–271; Bluntschli, §§ 827–840; the *Nancy*, 1 Acton, Adm. Rep. p. 64; the *Eagle*, Ibid. p. 65; III Dig. Int. Law, §§ 359, 360.

[2] II Halleck, p. 215; Hall, § 257; Creasy, § 600; Lawrence, Int. Law, § 272. A paper, or constructive, blockade is one established by proclamation without the actual presence of an adequate blockading force to prevent the entrance of neutral vessels into the port or ports so pretended to be blockaded. —II Halleck, p. 216. See, also, For. Rel. U. S. 1879, pp. 886–893, 1038, 1039.

ships or batteries of a belligerent This notification is given—[1]

(*a.*) *By proclamation*, announcing the date upon which a blockade will be established at a particular port. If a force adequate to the maintenance of the blockade be not stationed opposite the blockaded port on the date mentioned in the proclamation, a neutral vessel incurs no penalty by entering or leaving the port. This is the practice of England and the United States.[2] A blockade solely supported by proclamation, sometimes called a *paper* blockade, is not lawful and need not be observed by neutrals. Such undertakings were not infrequently resorted to by Great Britain and France during the Napoleonic wars, and were finally placed under the ban of international law by the clause of the Declaration of Paris that blockades to be binding must be effective.[3]

(*b.*) *By notification or endorsement.* This is, in substance, a warning given to neutral ships which are about to enter a blockaded port. The notification is given by ships of the blockading squadron, and is, or should be, endorsed on the ship's papers of the vessel notified or warned away. An attempt to enter after such notification constitutes a breach of blockade, and renders the vessel liable to seizure and condemnation.[4]

By proclamation and notification. This is a combination of the preceding methods. A proclamation is first issued fixing the date upon which the blockade will be established. A neutral vessel approaching the port after that date is warned

[1] Dahlgren, Int. Law, pp. 26, 61; the *Betsey*, 1 Robinson, Adm. Rep. p. 93; the *Nancy*, 1 Acton, Ibid. p. 64; the *Eagle*, Ibid. p. 65.

[2] II Halleck, p. 217; II Wildman, pp. 187–194; II Ortolan, liv. iii. chap. ix. p. 335; the *Vrow Johanna*, 2 Robinson, Adm. Rep. p. 109. For a proclamation of the States-General of Holland instituting a blockade, see 3 Robinson, 326, 327, note.

[3] V Calvo, §§ 2909–2938. For the British Orders in Council and the Berlin and Milan decrees of the Emperor Napoleon, see Edwards's Admiralty Reports, Appendices A to X.

[4] It is a settled rule that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it commences.—The Prize Cases, 2 Black, 635; III Dig. Int. Law, §§ 359, 360; the *Vroew Judith*, 1 Robinson, 150.

off by the blockading squadron, and is only regarded as liable to capture if, after such warning, an attempt be made to enter. This rule is advocated by France, and was outlined by the President of the United States in his proclamation of April 19, 1861. The prize-courts of the United States have ruled that the second notification is not legally necessary.[1]

It is thus seen that a mere notification, by proclamation or otherwise, not accompanied by the presence of a squadron, or by the establishment of batteries at the blockaded port, does not constitute a valid blockade at international law. On the other hand, if a *de facto* blockade be established by a belligerent at an enemy's port, it must be respected by neutrals as having the sanction of international law.[2] Neutral vessels attempting to enter, or desiring in good faith to ascertain whether such a blockade exists, are entitled to a notification or warning. An attempt to enter by night, or by the use of force or deception, or a refusal to stop, or to observe the signals and warning guns of the blockading squadron, renders the vessel liable to capture; the presumption being that a breach of blockade is intended. By far the greater number of attempts to break blockade are made in this way.[3]

The presence of a blockading squadron makes either ingress or egress unlawful. Vessels in port at the date when the blockade begins are permitted to leave with whatever cargo they may have on board at that time. In strictness, they may not complete their lading, after the blockade has been formally

[1] The *Heinrich* and *Maria*, 1 Robinson, Adm. Rep. p. 146; V Calvo, §§ 2828–2839; III Dig. Int. Law, §§ 359, 360. "It seems that by the true construction of the proclamation of the President of April 19, 1861, only those who are ignorant of the blockade are entitled to the warning and endorsement mentioned in the proclamation."—The *Revere*, 2 Sprague, 107. "As against the rebels, the United States has both sovereign and belligerent rights. In establishing the blockade it has exercised only belligerent rights, and as a sovereign it might, by a municipal regulation, have interdicted all commerce with ports in the states of the insurgents."—Ibid.

[2] Dahlgren, Int. Law, p. 51; III Dig. Int. Law, §§ 359, 360. "Neutrals may question the existence of a blockade, and challenge the authority of the party which has undertaken to establish it."—Prize Cases, 2 Black, 635.

[3] Dahlgren, Int. Law, p. 51.

established, and they have been held liable to capture for so doing.[1] As the object of a simple blockade is the interruption of *commercial* intercourse only, the public armed vessels of neutral powers are usually permitted to enter and leave a blockaded port. Their visit is for a public purpose; they do not carry in or bring out merchandise, and so cannot interfere with the purpose for which the blockade was established. Moreover, a refusal to permit them to enter may inflict unnecessary hardship upon a neutral government or its subjects, without in any way contributing to the purpose for which the war was undertaken.[2]

Cases of Innocent Entrance and Exit. Hall mentions a few instances in which merchant vessels may pass into, or out of, a blockaded port without breach of blockade.

(*a.*) When a maritime blockade does not form part of a combined operation by sea and land, internal means of transport by canals, which enable a ship to gain the open sea at a point which is not blockaded, may be legitimately used. The blockade is limited in its effect by its own physical imperfection. Thus, during a blockade of Holland, a vessel and cargo sent to Embden, which was in neutral territory, and issuing from that port, was not condemned.[3]

(*b.*) If a vessel is driven into a blockaded port by such distress of weather, or want of provisions or water, as to render entrance an unavoidable necessity, she may issue again, provided her cargo remains intact.[4] And a ship which has been

[1] "That a belligerent may lawfully blockade the port of his enemy is admitted. But it is also admitted that this blockade does not, according to modern usage, extend to a neutral vessel found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted. If, then, such a vessel be restrained from proceeding on her voyage by the blockading squadron, the restraint is unlawful."—Olivera *vs.* Union Insurance Co., 3 Wheaton, 194.

[2] Hall, Int. Law, p. 627; the *Adonis*, 5 Rob. Adm. Rep. p. 258; the *Mariana Flora*, 7 Wheaton, 59; the *Alexander*, 4 Rob. Adm. Rep. p. 93; III Dig. Int. Law, §§ 359, 360.

[3] The *Stert*, 4 Rob. Adm. Rep. p. 65; the *Twee Gebroeders*, 3 Ibid. p. 336; the *Magnus*, 1 Ibid. p. 31.

[4] The *Hurtige Hane*, 2 Rob. Adm. Rep. p. 324; the *Fortuna*, 5 Ibid.

allowed by a blockading force to enter, within its sight, is justified in assuming a like permission to come out; but the privilege is not extended to cargo taken on board in the blockaded port.[1]

Breach of Blockade: Penalty. The offence of attempting to enter or depart from a port or place of a belligerent against which a lawful blockade has been established is called a *breach of blockade.* An attempt on the part of a neutral merchant ship to enter a blockaded port constitutes a breach of blockade by ingress; an attempt to escape from such blockaded port or place constitutes a breach of blockade by egress. The penalty for breach of blockade consists in the forfeiture of the ship and cargo. As the offence consists in carrying on commercial intercourse with a blockaded port, the forfeiture includes everything which is engaged in the illegal venture.[2] "If their owners are different, the vessel may be condemned irrespectively of the latter, which is not confiscated when the person to whom it belongs is ignorant at the time of shipment that the port of destination is blockaded, or if the master of the vessel deviates to a blockaded harbor. If, however, such deviation takes place to a port the blockade of which was known before the ship sailed, the act is supposed to be in the service of the cargo, and the complicity of the owner is assumed."[3]

Duration of the Penalty. The penalty begins when a vessel clears from a neutral port with a hostile destination against which a blockade has been regularly established, and of the

p. 27; the *Adonis*, 5 Ibid. p. 256; the *Shepherdess*, 5 Ibid. p. 262; the *Spes* and *Irene*, 5 Ibid. p. 79; the *Charlotta*, Edwards, 252; the *Elizabeth*, Ibid. 199; Hall, § 265; Bluntschli, § 838. "To justify a vessel in attempting to enter a blockaded port, she must be in such distress as to render her entry a matter of absolute and uncontrollable necessity."—The *Diana*, 7 Wallace, 354.

[1] Hall, § 265; the *Jafrow Maria Schroeder*, 3 Rob. Adm. Rep. p. 160.

[2] III Phillimore, §§ 316–321; II Halleck, pp. 238–240; V Calvo, §§ 2880–2908; Hall, § 264; Vattel, liv. iii. chap. vii. § 117; II Twiss, §§ 109–116; the *Adonis*, 5 Rob. Adm. Rep. p. 257; the *Apollo*, Ibid. p. 287; the *Byfield*, Edwards, Adm. Rep. p. 188; the *Manchester*, 2 Acton, Ibid. p. 61.

[3] Dahlgren, pp. 54–61; Hall, § 264.

existence of which the neutral has, or is presumed to have, sufficient knowledge. An official proclamation of a blockade, made by a belligerent and communicated to neutral powers, would constitute such a presumption of knowledge.[1] If, on the other hand, the blockade existed without proclamation, the presumption would be in favor of the neutral vessel, and it would be entitled to a warning in approaching the blockaded port.[2]

The former rule was that, if the distance between the ports of origin and destination was so great as to require a considerable time in the prosecution of the voyage, a neutral was entitled to the presumption that the blockade had been raised during the continuance of his voyage, and so was entitled to a warning if the blockade existed at the time of his arrival at the port of destination.[3] The introduction of steam and the

[1] "A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as prize from the time of sailing."—The *Circassian*, 2 Wallace, 135. "Where a vessel knows of a blockade when she sails, and has no just reason to suppose it has been discontinued, her approach to the mouth of a blockaded port for inquiry is itself a breach of the blockade, and subjects both vessel and cargo to seizure and condemnation."—The *Cheshire*, 3 Wallace, 231 [235]. "A blockade, once regularly proclaimed and established, will not be held to be ineffective by continual entries in the log-book, supported by testimony of officers of the vessel seized, that, the weather being clear, no blockading vessels were to be seen off the port from which the vessel sailed."—The *Andromeda*, 2 Wallace, 481.

[2] Dahlgren, pp. 43–54.

[3] "No trade honestly carried on between neutral ports, whether of the same or different nations, can be lawfully interrupted by belligerents; but good faith must preside over such commerce: enemy commerce under neutral disguises has no claim to neutral immunity. . . . Neutrals may establish themselves, for the purposes of trade, in ports convenient to either belligerent; and may sell or transport to either such articles as either may wish to buy, subject to the risks of capture for violation of blockade or for the conveyance of contraband to belligerent ports."—The *Bermuda*, 3 Wallace, 514. "A vessel destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place, violates no blockade."—The *Peterhoff*, 5 Ibid. 28. "Destination alone justifies seizure and condemnation of ship and cargo in voyage to ports under blockade; and such destination justifies equally seizure of contraband in voyage to ports not under blockade; but in the last case, ship and cargo not contraband are free from seizure, except in case of fraud or bad faith."—The *Bermuda*, 3 Wallace, 514. "Mere sailing for

telegraph, however, have made it practically impossible for such a state of affairs to exist at the present time. Indeed, as blockade-running is now carried on in swift steamers, specially constructed for the purpose, no defence is usually attempted in the case of a vessel captured in the act.

When the offence is one of egress the penalty continues until the vessel reaches the territorial waters of a neutral state. The liability to capture also ceases when the blockade is raised during the return voyage, since the offence exists only so long as the blockade exists.[1]

Termination of Blockade. A blockade ceases when it is discontinued by the belligerent who establishes it, or is raised by an exercise of force on the part of the belligerent against whom it is declared. In the latter case the right of intercourse

a blockaded port is not an offence; but where the vessel has a knowledge of the blockade, and sails for the blockaded port with the intention of violating it, she is clearly liable to capture."—The *Admiral*, 3 Wallace, 604. "A voyage from a neutral port to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports, and whether to be performed by one vessel or by several employed in the same transaction and in the accomplishment of the same purpose."—The *Bermuda*, 3 Wallace, 514. "A British vessel captured during the rebellion and our blockade of the southern coast, by an American war steamer, on her way from England to Nassau, N. P., condemned as intending to run the blockade; Nassau being a port which, though neutral within the definition furnished by international law, was constantly and notoriously used as a port of call and transshipment by persons engaged in systematic violations of blockade, and in the conveyance of contraband of war; the vessel and cargo being consigned to a house well known, from previous suits, to the court as so engaged; the second officer of the vessel, and several of the seamen, examined *in preparatorio*, testifying strongly that the purpose of the vessel was to break the blockade; and the owner, who was heard, on leave given to him to take further proof touching the use he intended to make of the steamer after arrival in Nassau, and in what trade or business he intended she should be engaged, and for what purpose she was going to that port, saying and showing nothing at all on thos points."—The *Pearl*, 5 Wallace, 574.

[1] Dahlgren, Int. Law, p. 54; Upton, p. 287; Hall, § 263. "The liability to confiscation, which attaches to a vessel that has contracted guilt by breach of blockade, does not attach to her longer than until the end of her return voyage."—The *Wren*, 6 Wallace, 582; the *Weelvaard Van Pillaw*, 2 Rob. Adm. Rep. p. 128; the *Lisette*, 6 Ibid. p. 387.

with the port is revived in favor of neutrals, and continues to exist until the blockade is formally and effectively re-established.[1]

If the vessels of a blockading squadron are dispersed by a storm, the binding character of the blockade undergoes no change. The vessels of the squadron return to their stations, the blockade is resumed without notice, and neutral vessels approach at their peril.[2]

Pacific Blockade. The right to establish what is called a *pacific blockade* has been asserted on several occasions since the beginning of this century. It has never been regarded as a war measure; nor does it resemble, except in name, the belligerent right of blockade which is sanctioned by international law. Pacific blockades have always been made the subject of protest by neutrals, as unduly interfering with neu-

[1] "A public blockade—that is to say, a blockade regularly notified to neutral governments, and, as such, distinguished from a simple blockade, or such as may be established by a naval officer acting on his own discretion or under direction of his superiors—must, in the absence of clear proof of a discontinuance of it, be presumed to continue until notification is given by the blockading government of such discontinuance."—The *Circassian*, 2 Wallace, 135. V Calvo, §§ 2870–2879; Hall, § 261; III Phillimore, § 295; II Ortolan, p. 344; II Ferguson, § 280; Dana's Wheaton, § 513, note 233. "The occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing, the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war. Still less does it terminate a blockade proclaimed and maintained not only against that city, but against the port and district commercially dependent upon it and blockaded by its blockade."—The *Circassian*, 2 Wallace, 135. "The blockade of the coast of Louisiana, as established there, as on the rest of the coast of the Southern States generally by the proclamation of April 19, 1861 (12 Stat. 1258), was not terminated by the capture of the forts below New Orleans in April, 1862, by Commodore Farragut, and the occupation of the city by General Butler on May 6, 1862, and the proclamation of the President of May 12, 1862 (12 Stat. 1263), declaring that after June 1st the blockade of the port of New Orleans should cease. Hence it remained in force at Calcasieu, on the west extremity of the coast of Louisiana, as before."—The *Baigorry*, 2 Wallace, 474; the *Triheten*, 6 Robinson, 65; the *Hoffnung*, Ibid. 387.

[2] V Calvo, § 2871; III Phillimore, § 294; the *Columbia*, 1 Rob. Adm. Rep. p. 154.

tral trade. That such an operation is not a war measure is shown by the action of prize-courts in "refusing to condemn as prize because war did not exist."[1] It must, therefore, be regarded as a measure falling short of war, and must be justified, in any particular case, by the injury suffered by the state which resorts to it as a measure of obtaining redress. The first instance of such a blockade was that declared by England, Russia, and France against the Greek ports of Turkey in 1827. Others were declared by England and France against the Argentine Republic in 1838, and by France against Mexico in 1837. The former of these was maintained for ten years, the latter for less than two, terminating with the capture of the castle of San Juan de Ulloa in 1838.[2]

References. For a discussion of this subject, see Hall, chap. viii.; Boyd's Wheaton, §§ 509–523; Bluntschli, §§ 827–840; Lawrence, "International Law," §§ 269–276; II Halleck, chap. xxv.; Manning, bk. v. chap. ix.; II Wildman, pp. 178–210; Dahlgren, pp. 25–65, 129–142; Woolsey, §§ 202–207; Nys, "La Guerre Maritime," chap. iv.; Glass, "Marine International Law," pp. 423–462; V Calvo, §§ 2827–2938; II Ferguson, §§ 269–281; III Phillimore, pp. 473–521; II Twiss, §§ 98–120; Risley, pp. 239–248; Dana's Wheaton, §§ 509–524, notes 232–235; II G. F. De Martens, § 320; Klüber, §§ 297, 298; Heffter, pp. 289–294; Hautefeuille, "Droits des Nations Neutres," vol. ii. pp. 189–272; Ortolan, "Diplomatie de la Mer," and Wheaton's "History," etc. pp. 137–144. See, also, the valuable notes on this subject, under the title "Blockade," in Dana's and Lawrence's editions of Wheaton.

[1] Dahlgren, Int. Law, p. 27.

[2] See the title "Pacific Blockades" in the chapter entitled "The Conflict of International Rights." See, also, vol. xix. Revue de Droit Int. pp. 245, 377.

CHAPTER XV

THE RIGHT OF SEARCH

Nature of the Right. The belligerent rights which have already been discussed — of capturing enemy property at sea, of seizing contraband of war, and of blockading the coasts and harbors of an enemy — could none of them be made effective were not belligerents also accorded the right to stop and search all neutral merchant vessels on the high seas, for the purpose of ascertaining their nationality and destination, the character and ownership of their cargoes, and to effect their capture, should the result of such examination show a liability to capture to exist.[1]

When and Where Exercised. The right to stop and examine neutral vessels on the high seas is called the *belligerent right of search.* It comes into existence at the outbreak of war, and is terminated by the treaty of peace. Neutral merchant vessels, of whatsoever character, are subject to its exercise, and must submit to search when required to do so, in time of war, by a properly documented armed vessel of either belligerent. If they refuse, or resist, they are subject to seizure and condemnation. If the right be exercised by a belligerent in a manner not warranted by the law of nations, or in violation of the terms of a treaty, the remedy must be sought through the neutral government under whose flag the ship sails. As

[1] II Halleck, pp. 267, 268; the *Maria*, 1 Rob. Adm. Rep. p. 360; the *Antelope*, 10 Wheaton, 66; the *Anna Maria*, 2 Ibid. 327; II Ortolan, liv. iii. chap. vii.; Pistoye et Duverdy, tit. v. chap. i.; I Kent, p. 153; III Phillimore, pp. 523, 524; II Twiss, p. 177; Vattel, liv. iii. chap. vii. §§ 111–116; Bello, Derecho Internacional, part ii. chap. viii. § 10; *Le Louis*, 2 Dod. Adm. Rep. p. 210; vol. xix. Revue de Droit. Int. p. 367; vol. xx. Ibid. pp. 349, 487.

to place, the right of search may be exercised wherever a capture may lawfully be made — *i. e.*, on the high seas or within the territorial waters of either belligerent, but never in neutral waters.[1]

How Exercised. The manner in which the belligerent right of search is to be exercised is determined by the usage of nations, except in those cases in which it has been made the subject of treaty stipulation. Many such treaties are in existence, and they specify, in considerable detail, the manner in which the search shall be conducted by war-ships carrying the flags of the signatory powers. The duty of submitting is only incumbent upon neutral merchant vessels. Public armed vessels are not subject to visitation, either in time of peace or war, and the merchant vessels of a belligerent are justified in resorting to any measures, either of flight, resistance, or deception, which are calculated to enable them to escape search and inevitable capture. The right of search may be exercised by the regularly commissioned ships-of-war of a belligerent, or by duly authorized privateers in the service of those states which still retain the right to use that species of naval force in time of war.[2]

[1] Hall, § 270; III Phillimore, pp. 522–525, 530–533; II Twiss, pp. 176, 177; II Ferguson, § 237; II Ortolan, liv. iii. chap. vii. "The right of search is not a right wantonly to vex or control neutral commerce or indulge in idle curiosity. It is a right growing out of, and ancillary to, the greater right of capture, and can never arise except as a means to that end."—The *Nereide*, 9 Cranch, 388 [427]. "The right of visitation and search is a belligerent right which cannot be drawn into question, but must be conducted with as much regard to the safety of the vessel detained as is consistent with a thorough examination of her character and voyage."—The *Anna Maria*, 2 Wheaton, 327. "To detain for examination is a right which a belligerent may exercise over every vessel, except a national vessel, which he meets with on the ocean. The principal right necessarily carries with it all the means essential to its exercise; among these may sometimes be included the assumption of the disguise of a friend or an enemy, which is lawful stratagem of war."—The *Eleanor*, 2 Wheaton, 345; the *Antelope*, 10 Ibid. 66.

[2] II Twiss, pp. 176, 177; Hall, § 273; III Phillimore, pp. 536–542; the *Mariana Flora*, 11 Wheaton, 1; II Ortolan, liv. iii. chap. vii.; II Ferguson, § 238; vol. xix. Revue de Droit Int. p. 367; vol. xx. Ibid. pp. 349, 487.

Under ordinary circumstances, a man-of-war, in executing the right of search, hoists its national color, and fires an unshotted gun, as a signal to heave to. This is called the *coup d'assurance*, or affirming gun; and it is the duty of the neutral ship, on receiving this signal, to heave to at once and hoist her proper national flag. Should the signal not be obeyed, and should the failure to obey indicate an intention to resist search, the belligerent cruiser is justified in resorting to such measures of force as will compel obedience to its summons. An attempt at flight, unaccompanied by resistance, has been held not to involve the ship making it in the penalty for resisting search.[1]

The distance at which the searching vessel shall remain is determined by the judgment of her commanding officer, based upon the circumstances of wind and tide, upon the character of the vessel to be searched, and the necessity of remaining within easy supporting distance of the boat's crew by whom the search is carried on. The distance at which a man-of-war shall remain, when not regulated by treaty, is now a matter of but little importance. It was not so, however, in former times, when the right of search was executed by privateers, whose methods of search and capture were not above suspicion, and when piracy was a crime of much more frequent occurrence than at present.[2]

Duty of Boarding Party. An officer is sent on board to conduct the search. He is accompanied by a boat's crew, and by one or two persons to assist him in the performance of his duty. The purpose of the search may be:

[1] II Twiss, pp. 180–183; III Phillimore, pp. 537–541; the *Mariana Flora*, 11 Wheaton, 42; II Ferguson, § 238; II Ortolan, liv. iii. chap. vii. p. 249; II Halleck, pp. 285–287; Hall, §§ 270–277; Snow, pp. 159–162; Glass, pp. 155–164.

[2] "The limitation as to the strength of the search-party can be traced to a similar origin, and, like the former, is now less strongly insisted upon than formerly. To detain for examination is a right which a belligerent may exercise over every vessel, except a national vessel, which he meets on the ocean."—The *Eleanor*, 2 Wheaton, 345. "The principal right carries with it all the means essential to its exercise; among these may sometimes be included the assumption of the disguise of a friend or an enemy, which is a lawful stratagem of war."—Ibid.

(*a.*) To ascertain from the ship's papers the nationality and destination of the vessel.

(*b.*) To ascertain from the same source the character and destination of the cargo.

(*c.*) When the papers do not contain satisfactory information as to the character and destination of the ship and cargo, to ascertain those facts by actual inspection.[1]

If the ship's papers are in regular form, and show a *bona fide* neutral origin and destination of ship and cargo, the fact of the search having been made is noted upon them by endorsement, the search-party retires, and the vessel is allowed to proceed on its voyage.

If the papers indicate a hostile destination, the manifests, invoices, and bills of lading are examined, to ascertain whether there are contraband articles on board. If such be found, or if the vessel be destined to a blockaded port, the ship is declared a prize, her papers are sealed, and she is sent into port under a prize-master for adjudication. A similar course is pursued if there is sufficient ground for believing that her papers are false, if any of them are concealed or have been destroyed with a view to evade examination, or if spoliation has been practised.[2]

Release of Vessel on Surrender of Contraband Cargo. A practice has obtained to some extent of releasing a neutral ship and allowing it to continue its voyage on condition that the contraband part of the cargo be surrendered. This method of procedure is irregular, without warrant of law, and is likely to lead to serious complications. The captor, by assuming some of its functions, greatly embarrasses the proper prize-court in its action upon the captured property. The ship's papers, which in most cases constitute all the evidence upon which the court bases its decree, remain with the neutral vessel, and the court is obliged to proceed in the case without

[1] Dahlgren, Int. Law, p. 100; Snow, pp. 159–161; Glass, pp. 158–162; III Dig. Int. Law, § 325.

[2] Hall, § 273; the *Eleanor*, 2 Wheaton, 262; I Pistoye et Duverdy, p. 237; Annuaire, Inst. de Droit Int. 1883, p. 214; III Phillimore, pp. 533–536.

sufficient information. The master, under his general authority as such, cannot effect a legal surrender of a portion of his cargo in such a way as to bind the owners. His action, therefore, in a doubtful case, leaves to the owners the right of demanding through their government the restoration of the surrendered cargo. For these reasons the practice should not be resorted to unless authorized by treaty, or unless the owner, either personally or by his duly authorized representative, gives a legal consent to the proposed surrender.[1]

Resistance to Search or Capture. The right to evade search or to resist capture depends upon the nationality of the ship upon which such right is attempted to be exercised. As the merchant vessel of a belligerent and any property of the enemy which it carries are alike subject to capture, the penalty of condemnation is not increased or affected by resistance or evasion; an enemy's merchant ship may therefore resist, or may resort to fraud, deceit, or stratagem in order to evade search or avoid capture.[2] In respect to neutral ships, however, the matter rests upon quite a different basis. The existence of the *right* of search on the part of the belligerents implies the existence of a corresponding *duty* of submission on the part of the neutral. A neutral merchant ship is, therefore, bound to submit to search, in time of war, upon the demand of a public armed vessel or a lawfully commissioned cruiser of either belligerent; if resistance be attempted, or if fraud, deceit, or spoliation be resorted to, the effect will be to cause the condemnation of the property so withdrawn from search or examination. The belligerent is also authorized, in the event of resistance, to use such force as will enable him to execute the search or to effect the capture.[3]

[1] Dana's Wheaton, p. 665, note. See, also, note 1, p. 456, *ante*.

[2] The *Catharina Elizabeth*, 5 Rob. Adm. Rep. p. 232.

[3] II Halleck, p. 287; Snow, pp. 159–161; II Ortolan, pp. 259, 260; Hall, §§ 275, 276; V Calvo, §§ 2961–2968; III Phillimore, §§ 336–340; Bluntschli, §§ 819–826; Glass, p. 164; the *Maria*, I Rob. Adm. Rep. p. 375; the *Despatch*, 3 Ibid. p. 279; the *Elsabe*, 4 Ibid. p. 408; the *Purissima Concepcion*, 5 Ibid. p. 33; the *Fanny*, 1 Dodson, Ibid. p. 448; the *Topaz*, 2 Acton, Ibid. p. 20; the *Short Staple*, 9 Cranch, 55; the

The Right of Convoy. At a time when the rules of maritime capture were rigidly, and at times harshly and unjustly, enforced, it is not remarkable that neutrals should have sought to mitigate their severity by advocating methods which, while securing to belligerents their existing rights, were also calculated to relieve neutral commerce from some of the burdens to which it was exposed in war. The most important attempt of this kind was that originated by the Baltic powers towards the close of the last century, which has become known as the right of convoy. It was contended, in behalf of those powers, that the presence of a public armed vessel, with a fleet of neutral merchant ships, was sufficient to exempt them from search upon proper assurance being given, by the commanding officer of the armed vessel, that the ships under his convoy contained neither enemy goods nor contraband of war. In this form the right was first asserted by Sweden, and later by Holland, in the seventeenth century. The latter power, however, upon becoming a belligerent, changed its policy, and refused to recognize a practice for which it had formerly contended as a neutral. Renewed interest was shown in the subject between the years 1780 and 1800, during which period several treaties were entered into, chiefly by the Baltic powers, stipulating for the exemption from search of neutral vessels under neutral convoy.[1]

Nereide, Ibid. 388; the *Atlanta*, 3 Wheaton, 409. "If a *neutral* master attempts a rescue, he violates a duty which is imposed upon him by the law of nations, to submit to come in for inquiry as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the confiscation of the whole cargo intrusted to his care, and thus fraudulently attempted to be withdrawn from the rights of war. With an *enemy* master the case is very different. No duty is violated by such an act on his part —*lupum auribus teneo*—and if he can withdraw himself, he has a right to do so."—The *Catharina Elizabeth*, 5 Rob. Adm. Rep. p. 232.

[1] "The first and great object of the attention of an officer appointed to a service of this kind is the care of his convoy. He is not at liberty to desert it for the purpose of acquiring any advantage to himself, nor is he to volunteer any attack upon the enemy, if it takes him away from his first great duty. But, as far as consistent with that duty; he may pursue his own interest, and may attack and annoy the enemy

The introduction of the new rule was vigorously opposed by Great Britain, a power at that time more interested than any other in the maintenance of belligerent rights at sea. The position assumed by that government was, in substance, stated by Sir William Scott, in the case of the *Maria*, and may be summarized as follows:

(*a.*) The laws of maritime capture give to a belligerent an incontestable right to stop and search, on the high seas, all neutral merchant vessels.

(*b.*) A search, to be lawful, must be exercised directly by the belligerent cruiser, a separate search being made in the case of each neutral vessel encountered.

(*c.*) A neutral government cannot interpose its authority between a belligerent armed vessel and a neutral merchant ship, by giving to one of its public vessels instructions which are calculated to abridge, in any manner, the belligerent right of search.

(*d.*) The resistance of a convoying ship amounts, in effect, to resistance to search on the part of the merchant vessels composing the convoy, and involves them in the penalty of condemnation for such resistance of search.[1]

As England was at that time sufficiently powerful at sea to maintain its view against the opposition of any existing state, the neutral powers regarded the emergency as one of such importance as to seriously threaten the very existence of their commerce. To protect their menaced interests, a treaty was negotiated which created the defensive alliance known as the Armed Neutrality of 1800, the purpose of which was to maintain the principle of convoy as described in the treaty. In 1801, however, Russia, though a party to the Armed Neutrality, entered into an agreement recognizing the right of a belligerent to visit neutral merchant vessels sailing under a

in any way that may appear to him advantageous. He may capture the ships and goods of the enemy, provided he does not withdraw himself from the duty of protecting the vessels placed under his care, and may take the benefit of the prizes which he may have the good-fortune to make." — The *Galen*, 1 Dodson, 430.

[1] The *Maria*, 1 Rob. Adm. Rep. p. 340; see, also, note 3, p. 483, *ante*.

convoy; and the constantly increasing maritime power of England sufficed to defer indefinitely the general adoption of the principle of convoy as a rule of international law. Since the beginning of this century the right has been stipulated for in a number of treaties, to which the Continental states of Europe have been parties. England alone refuses to recognize the right, even as a part of the conventional law of nations, as she has ever denied its existence as a custom based upon general international usage.[1]

The views held as to the right of convoy by the different departments of the United States Government have been at considerable variance. The political departments have uniformly recognized its existence, and have endeavored to secure its general acceptance by treaty. The United States Navy Regulations provide in considerable detail for the manner in which the right of convoy shall be exercised by its public armed vessels. If the convoyed vessel is bound to a belligerent port the commander of the convoy is to require proof that there are no contraband articles on board; and without such proof he is not to afford her protection against a belligerent cruiser, unless specially directed to do so; "he is not to permit the vessels under his protection to be searched or detained by any belligerent cruiser."[2] The judicial department, on the other hand, has followed the English precedents in denying the existence of the right of convoy as a rule or principle of international law.[3]

At the present time it is not believed that any serious objection would be offered by any modern state to the general adoption of the principle of convoy as a rule of international law, under such restrictions as would be calculated to prevent abuse, and accompanied by such conditions as would secure to belligerents a right as effective as that which they now enjoy.

[1] Hall, § 272; II Halleck, pp. 291–295; Boyd's Wheaton, §§ 525–537; III Phillimore, pp. 544–558; II Ortolan, liv. iii. chap. vii. pp. 261–282; Dana's Wheaton, § 526, note 242; I Kent (Holmes's ed.), pp. 153–156; the *Maria*, 1 Rob. Adm. Rep. p. 340.

[2] Par. 410, Navy Regulations of the United States, 1896; Snow, pp. 160, 161; Glass, pp. 165–168.

[3] III Dig. Int. Law, § 346.

That such a rule has not been adopted, or seriously advocated, is doubtless due to the fact that the necessity for its existence has passed away. The introduction of steam navigation involved an immediate and radical reorganization of the carrying trade of the world. The establishment of steamship lines, upon the old routes of commerce, has monopolized a trade which was formerly carried on in sailing vessels, and it is no longer regarded as desirable that even sailing vessels, in time of war, should move in fleets or convoys.

Searches Authorized in Time of Peace. The right of search has been shown to be a belligerent right, and so existent only in time of war. In time of peace a right of visitation or search is recognized in the following cases:

(*a.*) *Search to Execute Revenue Laws.* Merchant vessels coming into the jurisdiction of a state are subject to such inspection, and their cargoes to such examination and search, as are warranted by the municipal laws of that state, or are necessary to the enforcement of its sanitary and customs regulations. A vessel which attempts to evade such inspection, at any time during its sojourn, may be detained and subjected to such penalties as are authorized by the laws of the offended state. It is questionable whether the right exists of pursuing such vessels upon the high seas, and of effecting their capture beyond the jurisdictional waters of the captor's state.[1] If such right exists at all, it is based upon international comity, and, in any particular case, its exercise must be justified by the emergency existing, in which event the government to which the offending

[1] Dana's Wheaton, § 179, note 108; the *Louis*, 2 Dodson, Adm. Rep. p. 246; the Hovering Acts (1736), 9 Geo. II. chap. xxxv.; Vattel, liv. i. chap. xxiii. § 281; Church *vs.* Hubbard, 2 Cranch, 187. The practice of the United States in this regard is regulated by the requirements of section 3067 of the Revised Statutes, which provides that "it shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue-cutters, to go on board of vessels in any port of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests, and of examining and searching the vessels; and those officers respectively shall have free access to the cabin and every other part of a vessel."

vessel belongs may, and usually does, waive its strict rights in the premises, and declines to protect its subjects in wrong-doing.[1]

(*b.*) *Search on Suspicion of Piracy.* Public armed vessels of any state are justified, when reasonable grounds of suspicion exist, in stopping vessels on the high seas which are believed to be engaged in piratical undertakings. If the search be made in good faith, and upon grounds warranting a suspicion of piracy, no claim for damage can be established, even in cases where the character of the ship visited proves to be legitimate.[2]

(*c.*) *Search of Merchant Ships by War Vessels of the same State.* The public armed vessels of a state may execute such visits of search and inspection, upon merchant vessels of the same nationality, as are authorized by the laws of the state under whose flag they sail. This is a question of municipal law pure and simple, and the search authorized may be as frequent or infrequent, as lax or as vigorous, as is deemed best by the government to which both vessels belong.

(*d.*) *Right of Approach to Verify Nationality.* Public armed vessels, of whatever nationality, are also authorized to approach merchant vessels on the high seas for the purpose of ascertaining their nationality. In the performance of this duty, except where suspicion of piracy exists, they are limited to hailing and the use of flags and signals. They board such vessels at their peril.[3]

[1] II Halleck, p. 270; Risley, p. 47; Dana's Wheaton, § 124, note 83; III Dig. Int. Law, § 326; Hall, § 80; Woolsey, § 213. "Nations may prevent the violation of their laws by seizures on the high seas, in the neighborhood of their coasts, and there is no fixed rule prescribing the distance from the coast within which such seizures may be made." —Church *vs.* Hubbard, 2 Cranch, 187. "To come within such an exception, the seizure must be justifiable under the laws of the country making the seizure." — Ibid. "The municipal laws of one nation do not extend in their operation beyond its own territory, except as regards its own citizens. A seizure for the breach of the municipal laws of one nation cannot be made within the territory of another." — The *Apollon*, 9 Wheaton, 362.

[2] Hall, § 81; I Calvo, § 508; II Halleck, pp. 273, 274; Bluntschli, §§ 343–350; I Dig. Int. Law, §§ 33, 33a, 50a; III Ibid. § 326.

[3] III Phillimore, pp. 524, 525; I Ortolan, liv. ii. chap. xii.; II Twiss,

Case of the "Virginius." The question of search in peace is illustrated by the case of the *Virginius*. The *Virginius* was a steamer which had been specially constructed in England, with a view to her employment as a blockade runner. While engaged in this service she was captured by one of the United States blockading squadrons, and was condemned and sold for violation of blockade. She afterwards came into possession of the United States, in satisfaction of a debt, and on August 2, 1870, was sold, ostensibly to one Patterson, a resident of New York. At this sale a formal certificate of registry was issued, giving her the character of a merchant vessel of the United States. From this time until 1873 she was engaged in various undertakings, some of which were of so questionable a character as to have involved the forfeiture of her register, had they been made known to the proper authority. No complaint

p. 179; II Halleck, pp. 270–272; Woolsey, § 213; III Dig. Int. Law, § 325; the *Mariana Flora*, 11 Wheaton, 1; 1 Kent, p. 153, note. "Though the right of search of foreign vessels does not exist in time of peace, yet a cruiser has a right to approach for purposes of observation." — The *Mariana Flora*, 11 Wheaton, 1. "The vessel approached is under no obligation to lie by, but neither has she a right to fire on a cruiser approaching, upon a mere conjecture that she is a pirate; and if this be done, the cruiser may lawfully repel force by force and capture her." — Ibid. "There is no obligation to affirm a flag with a gun by an American cruiser in time of peace."—Ibid. "When a vessel interrogated at sea answers either in words or by hoisting her flag, the response must be taken for true, and she must be allowed to keep her way; the interrogator cannot stop her, to verify it by visitation, search, or otherwise." —IX Opin. Att.-Gen. p. 455. "A cruiser of one nation has a right to know the national character of any strange ship she may meet at sea, but the right is not a perfect one, and the violation of it cannot be punished by capture and condemnation, nor even by detention."—Ibid. "The party making the inquiry must raise his own colors, or in some other way make himself fully known, before he can lawfully demand such knowledge from the other vessel."—Ibid. "If this is refused, the inquiring vessel may fire a blank shot, and in case of further delay a shotted gun may be fired across the bows of the delinquent."—Ibid. "Any measure beyond this which the commander of an armed ship may take for the purpose of ascertaining the nationality of another vessel must be at his peril."—Ibid. "This right of inquiry can be exercised only on the high seas, and no naval officer has the right to go into the harbor of a nation with which his government is at peace to inquire into the nationality of a vessel which is lying there."—Ibid.

appears to have been made to the government of the United States as to her character or employment during the period in question.

On October 30, 1873, she sailed from Jamaica for Port Limon, in Costa Rica, carrying the American flag, and provided with regular clearance papers from the American consul at Kingston, Jamaica. On October 31, while on the high seas, about twenty miles distant from the island of Cuba, she was sighted and chased by the Spanish war steamer *Tornado*. After a pursuit of about eight hours she was captured on the high seas, at a point about sixty miles distant from the coast of Cuba, and twenty-three miles from the island of Jamaica, in which direction she was steaming at the time. She was boarded by an officer of the *Tornado*, her officers, crew, and passengers were made prisoners, and she was sent under a prize crew to the Spanish port of Santiago de Cuba, where she arrived on the evening of November 1.

At nine o'clock on the morning of the following day a court-martial was convened for the trial of the captured persons, who were arraigned on a charge of piracy. The court-martial completed its labors at four o'clock in the afternoon of the same day. On the morning of November 4 four persons were executed, on the 7th twelve, on the 13th thirty-seven more, including a number of British subjects and citizens of the United States.

The attention of the Spanish Government was immediately drawn to the occurrence, and protests against the action of its subordinate officials were made by the American consuls at Havana and Santiago de Cuba, but with so little effect that, on November 14th, the United States minister to Spain was instructed to demand the restoration of the steamer, the return and delivery to the United States of the persons who had been captured, and the punishment of the officials who had been concerned in the capture of the vessel and the execution of her crew. He was also instructed to demand that the flag of the United States should be saluted in the harbor of Santiago de Cuba. After some correspondence between the two gov-

ernments an agreement was entered into on November 29, between the Secretary of State and the Spanish minister in Washington, stipulating for the restoration of the vessel and the surrender of the survivors of the passengers and crew. It was also agreed that the flag of the United States should be saluted on the 25th day of December next ensuing. If, however, on or before that date, the Spanish government should prove that the *Virginius* was not entitled to her American register, the salute was to be spontaneously dispensed with; the United States agreeing to institute legal proceedings against the vessel, if it should be found that she had violated any law of the United States, and against any person who was shown to have been concerned in such violation.

The ship and survivors were surrendered at Santiago de Cuba on December 18, 1873; and it having been made to appear, to the satisfaction of the United States, that the *Virginius* was not entitled to carry its flag and papers, the Spanish minister was formally notified that the salute would be dispensed with.[1]

The following conclusions seem to be warranted by the facts in the case:

(*a.*) The *Virginius* was not a pirate, whatever may have been the character of the transaction in which she was engaged, and the Spanish authorities acted without warrant of international law in proceeding against the crew and passengers for the crime of piracy.

(*b.*) The Spanish Government would have been justified in resisting any acts of war or hostility directed against itself and occurring within its territorial waters. It matters not with whom such acts or attempts originated, or by whom they were committed, whether subjects or aliens. Had the *Virginius*, therefore, been found in Spanish jurisdiction, engaged in landing, or attempting to land, her passengers upon the

[1] III Dig. Int. Law, § 327; Parl. Pap. 1874, lxxvi. pp. 65, 85; Hall, pp. 263, 264, 271–274; Woolsey, § 214; Boyd's Wheaton, § 124d; For. Rel. U. S. 1876, pp. 488–490. "Ship's papers and documents accompanying property, under the law of nations, are but *prima facie* evidence of such property, and are of no force when shown to be fraudulent." — United States *vs.* the *Amistad*, 15 Peters, 518 [520].

coast of Cuba, her forcible seizure would have been justified. Had resistance been offered, that resistance could have been overcome by force at any cost of life or property. The treatment of those on board would then have been determined, according to the nature and degree of their offences, by the municipal laws of Spain. If the provisions of that system of law had been affected or modified by treaty stipulations, guaranteeing to the citizens or subjects of foreign states certain rights and privileges in the event of their being charged with crime while in Spanish jurisdiction, the government of Spain would have been responsible for the observance of the treaty in all cases to which its provisions applied.

(*c*.) The pursuit and capture of the vessel on the high seas was an act of very doubtful validity, and could only have been justified, in any event, by the extreme urgency of the case, and then only in the exercise of the right of self-defence. In this instance it is extremely doubtful whether such an emergency existed as to justify a resort to force in self-defence. The *Virginius* was flying the American flag when sighted, and had not then entered Spanish waters; until she did so enter them she was not subject to visitation and search, still less to pursuit and capture.[1]

(*d*.) The later conduct of the Spanish authorities in Cuba can only be characterized as unnecessary, not warranted by the emergency, and cruel and inhuman in the extreme. It was also contrary to the stipulations of treaties, and was grossly illegal even when judged by the standard of the municipal

[1] "The *Virginius*, though registered as an American vessel, was, in fact, owned by foreigners, and the registry thereof was fraudulently obtained; and hence, at the time of her capture by the Spanish man-of-war *Tornado*, she had no right, by virtue of that registry, as against the United States, to carry the American flag." — XIV Opin. Att.-Gen. p. 49. "Yet, while upon the high seas, actually bearing an American register and carrying an American flag, she was as much exempt from interference by another power as though she had been lawfully registered; the question whether or not her register was fraudulently obtained, or whether or not she was sailing in violation of any law of the United States, being one over which such power could not then and there rightfully exercise jurisdiction." — Ibid.

law of Spain. The *Virginius* was an unarmed merchant vessel. She offered, and was capable of offering, no resistance to search or capture. Her passengers, at the instant of capture, were not armed or organized, and so were incapable of levying war against the authority of Spain, whatever may have been their ultimate intention. So soon as the passengers and crew were made prisoners they were absolutely powerless to do harm, and the fact that the ship sailed under the American flag should have suggested such reasonable delay in the proceedings against them as would have sufficed to enable proper representations to be made to that government as to the service in which its flag and papers were being used.

(*e.*) The action of the Spanish authorities in this matter would not have been justified or recognized as lawful had it been performed by a belligerent in time of war. Had a state of open war existed, and had the *Virginius* been captured at sea with enemy goods or contraband articles on board, the ship would not have been involved in the forfeiture, and her passengers and crew could not have been subjected to detention. Had she been captured in the act of violating a legal blockade, the ship and cargo alone would have been liable to forfeiture. Had she been engaged in carrying military persons to a hostile destination, her contraband passengers only could have been made prisoners of war. The crew could have incurred no penal consequences for their share in the transaction.

THE RIGHT OF VISITATION: IMPRESSMENT OF SEAMEN

The Right of Visitation. The belligerent right of search has never been seriously questioned, and is accepted by all nations as a fact inseparably connected with the existence of war. A right somewhat resembling it, called the *right of visitation*, has been asserted to exist in time of peace, but has never received universal sanction, and is now generally abandoned, save in a few cases, where it maintains a lingering existence by treaty. In the long controversy which was carried on as to the assumed legality of this right, during the early

part of the present century, England and the United States were the principal participants.

It was maintained, on the part of the British Government, that the rights of search and visitation were entirely distinct from each other, having a different origin and purpose. The *right of search* was peculiar to a state of war. The *right of visitation* existed in peace, and consisted in such an examination of merchant vessels, on the high seas, as was necessary to determine their nationality, the sufficiency and regularity of their papers, and the legality of the undertaking in which they were engaged.

On the part of the United States, it was contended that the right of search was an incident of belligerency; that it existed only during the continuance of war, and not only did not exist in time of peace, but an attempt to exercise it was an invasion of sovereignty which, if not disclaimed, would constitute a just cause for war. The controversy was brought to an end, in 1858, by a formal renunciation, on the part of the British Government, of the right of visitation in time of peace, except in cases where it was authorized by treaty stipulations. Of the justice and expediency of this abandonment there can be little question. The crimes of piracy and the slave-trade, the prevalence of which furnished the only reason for its existence, have practically disappeared. Its continued exercise, therefore, is unnecessary, giving rise to constant complaint and frequent international misunderstandings; nor can any good purpose be accomplished by it which could not be attained by the use of other and less questionable means. It lies within the power of every maritime state to establish and maintain such constant police supervision over its merchant marine as will prevent its register from being improperly used, and its flag from covering transactions which are not authorized by its municipal laws or sanctioned by the law of nations.[1]

[1] II Halleck, pp. 268–283; Manning, pp. 456–464; Ortolan, liv. ii. chap. xi. pp. 253–256; III Phillimore, pp. 522–530; Dana's Wheaton, §§ 106–109, notes 66, 67; V Calvo, §§ 2939, 2940, 2954, 2992–3003; Woolsey, §§ 219–221; Snow, p. 159; III Dig. Int. Law, § 327; the

Impressment of Seamen. During the naval wars succeeding the French Revolution, the British Government, in exercising the right of search, made a practice of extracting certain persons from neutral vessels, claiming that they were British subjects, and so liable to impressment into its naval service. The exercise of this right, which never received the sanction of international law, bore with peculiar hardship upon vessels sailing under the American flag, and manned largely by persons of the same race and speaking the same language as those by whom the search was conducted, and upon whose decision, in the matter of nationality, the question of seizure largely depended. On the part of Great Britain it was alleged that an important naval war was being carried on,[1] of the justice of which there could be no question, and whose ultimate success involved the maintenance of enormous armaments at sea. To maintain its position, the British Government had been obliged to impose heavy burdens upon the property and personal services of its subjects,[2] many of whom had attempted to evade their obligation by taking service in the merchant marine of neutral powers. The continued exercise of this right, in the face of repeated protests, led to the war of 1812 between England and the United States, which was terminated, however, without a definite settlement of this important question. The controversy was revived at a later period, and was exhaustively discussed by representatives of both governments in a long and ably conducted diplomatic correspondence.[3] It

Mariana Flora, 11 Wheaton, 42–44; *Le Louis*, 2 Dodson, Adm. Rep. p. 210.

[1] "It has been estimated that at one time over seventy thousand British subjects were employed in the naval and merchant services of foreign powers."—Ashton, Old Times.

[2] "Article 45 of the British Navy Regulations of 1787 required commanders of English men-of-war to demand English seamen out of foreign ships wherever met with."—II Halleck, p. 302, note.

[3] The United States Navy Regulations, ed. 1896, par. 410, contains the following provision: "Commanders of public vessels of war are not to suffer their vessels to be searched by any foreign power under any pretext, nor any officers or men to be taken out, so long as they have power of resistance. If force be used, resistance must be continued as long as possible. If over-

was terminated, so far as the American Government was concerned, by an announcement of policy contained in a letter of Mr. Webster to Lord Ashburton, bearing date of August 8, 1842. "The American Government," says Mr. Webster, "is prepared to say that the practice of impressing seamen from American vessels cannot hereafter be allowed to take place. That practice is founded on principles which it does not recognize, and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude as cannot be submitted to. In the early disputes between the two governments on this so-long-contested topic, the distinguished person to whose hands were first committed the seals of this department declared that the simplest rule will be, that the vessel, being American, shall be evidence that the seamen on board are such. Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration now had of the whole subject, at a moment when the passions are laid and no present interest or emergency exists to bias the judgment, have fully convinced this government that this is not only the simplest and best, but the only rule which can be adopted and observed consistently with the rights and honor of the United States and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their government. *In every regularly documented American merchant vessel the crew who navigate it will find their protection in the flag which floats over them.*" [1]

come, they are to yield their vessel, but not their men without the vessel."

[1] Secretary Webster to Lord Ashburton, August 8, 1842, Webster, Diplomatic and Official Papers, p. 101; Dana's Wheaton, §§ 106–109, note 67; III Dig. Int. Law, § 327; II Halleck, pp. 300–303; Manning, pp. 456–464; Woolsey, § 221; Snow, p. 162; I Kent (Holmes's ed.), p. 153, note b. The practice of impressing seamen was not restricted to American merchant vessels alone, but was exercised upon public vessels as well. In 1798 the British war-ship *Carnatic*, seventy-four, boarded an American war vessel off the port of Havana. See, also, the case of the *President*, II Halleck, p. 303, note; Brenton, Naval History of Great Britain, pp. 200–203; vol. xxii. Revue de Droit International, pp. 317, 454; vol. xix. Ibid. p. 367; vol. xx. Ibid. pp. 349, 487, 601.

References. The student, for fuller discussion of this subject, is referred to Vattel, liv. iii. chap. vii. §§ 114–116; II Halleck, chap. xxvii., with the references there given to the "American State Papers"; Boyd's Wheaton, pp. 169–173, 607–622; Manning, bk. v. chap. xi.; III Phillimore, pp. 522–558; Dahlgren, pp. 100–110; Woolsey, §§ 208–221; Glass, "Marine International Law," pp. 509–552; Dana's Wheaton and Lawrence's Wheaton, with their references to the correspondence between the British and American governments upon the question of impressment and the rights of visitation and search; II G. F. De Martens, § 321; Heffter, pp. 318–328; Wheaton, "History of the Law of Nations," pp. 145–151, 392–449, 599–713; III Hautefeuille, pp. 1–208; V Calvo, §§ 2939–3003; II Twiss, §§ 91–95; Hall, §§ 270–273; II Ortolan, pp. 245–282; III Digest of International Law, §§ 327–331; Walker, "Science of International Law," pp. 123–124; Lawrence, § 210; II Ferguson, §§ 236–240; Bluntschli, §§ 819–826. See, also, the articles by M. Lyon-Caen, in vol. xix. "Revue de Droit International," p. 367; vol. xx. Ibid. pp. 349, 487, 601; and "Le Droit de Visite," by Thomas Barclay, vol xxii. Ibid. pp. 317, 454.

APPENDICES

APPENDIX A

PROFESSOR FRANCIS LIEBER'S INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD

History

The need of a positive code of instructions was severely felt during the early part of the Civil War in the United States. During the first two years of that war the Federal Government had succeeded in placing in the field armies of unexampled size, composed, in great part, of men taken from civil pursuits, most of whom were unfamiliar with military affairs, and so utterly unacquainted with the usages of war. These armies were carrying on hostile operations of every kind over a wide area, and questions of considerable intricacy and difficulty were constantly arising, which required for their decision a knowledge of international law which was not always possessed by those to whom these questions were submitted for decision. Conflicting decisions and rulings were of frequent occurrence in different armies, and at times in different parts of the same field of operations; and great harm not infrequently resulted before these decisions could be reversed by competent authority.

To remedy this difficulty, Professor Francis Lieber, an eminent jurist, who had been for many years an esteemed and honored citizen of the United States, was requested by the Secretary of War to prepare a code of instructions for the government of the armies in the field. This code, while conforming to the existing usages of war on land, was to contain such modifications as were necessary to adapt those usages to the peculiar circumstances of the contest then prevailing. The rules prepared by Dr. Lieber were submitted to a

board of officers, by whom they were approved and recommended for adoption. They were published in 1863, and were made obligatory upon the armies of the United States by their publication in the form of a General Order of the War Department.

Although more than a generation has elapsed since they were prepared, they are still in substantial accordance with the existing rules of international law upon the subject of which they treat, and form the basis of Bluntschli's and other elaborate works upon the usages of war. They are accepted by text writers of authority as having standard and permanent value, and as expressing, with great accuracy, the usage and practice of nations in war.

There has been some misunderstanding, however, as to the force and significance of Professor Lieber's rules, to which it is proper to allude.

The war which existed at that time was strictly *internal* in character; and, although the belligerency of the states in rebellion had been recognized by the Federal Government, the character of the contest, in many of its aspects, differed materially from an *external* war, in which the belligerent parties were independent states.

The war policy of the United States towards the insurrectionary forces was, in the main, in accordance with the laws of war, as those laws were then accepted and understood. Its enemies, however, were its own citizens, who, for the time, denied its sovereign authority, and refused obedience to its laws. Its right to suppress the rebellion, and its right to choose its method of doing so, were alike beyond dispute. In the exercise of this right it was at perfect liberty to choose any policy between the methods provided by its municipal laws, on the one hand, and those provided by the law of nations on the other.

As a matter of fact it chose a war policy lying between the extremes above indicated. General operations in the field were carried on in accordance with the laws of war. In its treatment of the property of individuals in rebellion, in its view of occupation and of occupied territory, and in its policy towards the residents of such occupied territory, it pursued a course which it deemed best suited to the task upon which it was then engaged—the suppression of a rebellion against its authority.

The rules, therefore, cannot fairly be said to contain a full expression of the views or future policy of that government upon the subject of external war. Should such a war occur, it is at least extremely probable that the United States would range itself with

those powers whose practice it is to maintain small permanent establishments, and whose policy is defensive rather than offensive.[1]

(*General Orders No.* 100, *Adjutant-General's Office*, 1863.)

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD

PREPARED BY FRANCIS LIEBER, LL.D., AND REVISED BY A BOARD OF OFFICERS OF THE UNITED STATES ARMY

SECTION I

MARTIAL LAW — MILITARY JURISDICTION — MILITARY NECESSITY — RETALIATION

1. *How Established.* A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its martial law.

2. Martial law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief, or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

3. *In What it Consists.* Martial law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

[1] These instructions were issued, without modification, for the government of the armies of the United States during the war with Spain in 1898.

4. *Effects.* Martial law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

5. Martial law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed—even in the commander's own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

To save the country is paramount to all other considerations.

6. All civil and penal law shall continue to take its usual course in the enemy's places and territories under martial law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under martial law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader.

7. Martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

8. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to martial law in cases of urgent necessity only; their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

9. The functions of ambassadors, ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.

10. Martial law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or

by the invader, and refers mainly to the support and efficiency of the army, its safety, and the safety of its operations.

11. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

Offences to the contrary shall be severely punished, and especially so if committed by officers.

12. *How Executed.* Whenever feasible, martial law is carried out in cases of individual offenders by military courts; but sentences of death shall be executed only with the approval of the chief executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

13. *Military Jurisdiction.* Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offences under the statute law must be tried in the manner therein directed; but military offences which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the "Rules and Articles of War," or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.

14. *Military Necessity.* Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all with-

holding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God.

16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

18. When the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

19. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

20. *Public War.* Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

21. *Enemies.* The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

22. *Non-combatants.* Nevertheless, as civilization has advanced

during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection, and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

25. In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

27. *Retaliation.* The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

28. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably—that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents further and further from the mitigating rules of a regular war, and by rapid steps leads them nearer to the internecine wars of savages.

29. *Modern War.* Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

30. Ever since the formation and co-existence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defence against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions, on principles of justice, faith, and honor.

SECTION II

PUBLIC AND PRIVATE PROPERTY OF THE ENEMY—PROTECTION OF PERSONS, AND ESPECIALLY WOMEN; OF RELIGION, THE ARTS AND SCIENCES—PUNISHMENT OF CRIMES AGAINST THE INHABITANTS OF HOSTILE COUNTRIES.

31. *Public Property.* A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

32. A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another.

The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

33. It is no longer considered lawful—on the contrary, it is held to be a serious breach of the law of war—to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the

hostile country or district, that it is resolved to keep the country, district, or place permanently as its own, and make it a portion of its own country.

34. *Works of Art, Libraries, Hospitals.* As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character — such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places while besieged or bombarded.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, or shall they ever be privately appropriated or wantonly destroyed or injured.

37. *Private Property.* The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offences to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, land, boats or ships, and churches, for temporary and military uses.

38. Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity, for the support or other benefit of the army of the United States.

If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.

39. The salaries of civil officers of the hostile government who

remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war—such as judges, administrative or police officers, officers of city or communal governments—are paid from the public revenue of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

40. *Rules of War.* There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

41. All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

42. *Slavery.* Slavery, complicating and confounding the ideas of property (that is, of a *thing*), and of personality (that is, of *humanity*), exists according to municipal law or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villains, or serfs into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

43. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or state can have, by the law of postliminy, no belligerent lien or claim of service.

44. *Wanton Violence.* All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking,

even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

45. *Captured Property, Booty.* All captures and booty belong, according to the modern law of war, primarily to the government of the captor.

Prize money, whether on sea or land, can now only be claimed under local law.

46. Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offences to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offence may require; if by soldiers, they shall be punished according to the nature of the offence.

47. *Crimes.* Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred.

Section III

Deserters — Prisoners of War — Hostages — Booty on the Battle-field

48. *Deserters.* Deserters from the American army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture or being delivered up to the American army; and if a deserter from the enemy, having taken service in the army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

49. *Prisoners of War.* A prisoner of war is a public enemy armed or attached to the hostile army for active aid who has fallen into

the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

The monarch and members of the hostile reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's government, prisoners of war.

51. *Levies en Masse.* If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy *en masse*, to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.

52. No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

53. *Chaplains, Surgeons, etc.* The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses, and servants, if they fall into the hands of the American army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

54. *Hostages.* A hostage is a person accepted as a pledge for the fulfilment of an agreement concluded between belligerents during the war or in consequence of a war. Hostages are rare in the present age.

55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

56. *Treatment of Prisoners of War.* A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

57. So soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are no individual crimes or offences. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

58. The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation if not redressed upon complaint.

The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

60. *Quarter.* It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners.

61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

63. *Uniform.* Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

64. If American troops capture a train containing uniforms of the

enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

65. *Flag.* The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

66. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.

67. The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

68. *Unnecessary Destruction of Life.* Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war—and, indeed, modern war itself—are means to obtain that object of the belligerent which lies beyond the war.

Unnecessary or revengeful destruction of life is not lawful.

69. Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

70. *Poison.* The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the army of the United States or is an enemy captured after having committed his misdeed.

72. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

Nevertheless, if *large* sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the commander, unless otherwise ordered by the government. Nor can prisoners claim as private property large sums found and captured in their train, although they had been placed in the private luggage of the prisoners.

73. *Surrender of Arms.* All officers, when captured, must surrender their side-arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery, or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored cannot wear them during captivity.

74. *Ransom of Prisoners.* A prisoner of war being a public enemy, is the prisoner of the government, and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The government alone releases captives, according to rules prescribed by itself.

75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

76. Prisoners of war shall be fed upon plain and wholesome food whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

77. A prisoner of war who escapes may be shot or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons.

78. If prisoners of war, having given no pledge nor made any

promise on their honor, forcibly or otherwise escape, and are captured again in battle, after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

80. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired informationor to punish them for having given false information.

Section IV

PARTISANS—ARMED ENEMIES NOT BELONGING TO THE HOSTILE ARMY —SCOUTS—ARMED PROWLERS—WAR-REBELS

81. *Partisans.* Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

82. *Guerillas.* Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and vocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

83. Scouts, or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the

hostile army, for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

85. *War-rebels.* War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or to armed violence.

SECTION V

SAFE-CONDUCTS — SPIES — WAR-TRAITORS — CAPTURED MESSENGERS — ABUSE OF THE FLAG OF TRUCE

86. *Safe-conducts.* All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct, or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government or by the highest military authority.

Contraventions of this rule are highly punishable.

87. Ambassadors and all other diplomatic agents of neutral powers accredited to the enemy may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the state, and not by subordinate officers.

88. *Spies.* A spy is a person who secretly, in disguise or under false pretence, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether

or not he succeed in obtaining the information or in conveying it to the enemy.

89. If a citizen of the United States obtains information in a legitimate manner and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

90. *War-traitors.* A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

91. The war-traitor is always severely punished. If his offence consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

92. If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offence.

93. *Guides.* All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise.

94. No person having been forced by the enemy to serve as guide is punishable for having done so.

95. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor, and shall suffer death.

96. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97. Guides, when it is clearly proved that they have misled intentionally, may be put to death.

98. *Communications with the Enemy.* All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from this law. They may communicate with foreign parts, or with the inhabitants of the hostile country so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

99. A messenger carrying written despatches or verbal messages

from one portion of the army, or from a besieged place, to another portion of the same army, or its government, if armed and in the uniform of his army, and if captured while doing so in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform, nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

100. A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.

101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

102. The law of war, like the criminal law regarding other offences, makes no difference on account of the difference of sexes, concerning the spy, the war-traitor, or the war-rebel.

103. Spies, war-traitors, and war-rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the government, or, at a great distance from it, by the chief commander of the army in the field.

104. A successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous.

SECTION VI

EXCHANGE OF PRISONERS—FLAGS OF TRUCE—FLAGS OF PROTECTION

105. *Exchanges.* Exchanges of prisoners take place, number for number, rank for rank, wounded for wounded, with added condition for added condition—such, for instance, as not to serve for a certain period.

106. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior

rank as may be agreed upon by cartel, which requires the sanction of the government or of the commander of the army in the field.

107. A prisoner of war is in honor bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange, nor a higher rank, for the purpose of obtaining better treatment.

Offences to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

108. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessaries.

Such arrangement, however, requires the sanction of the highest authority.

109. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable so soon as either party has violated it.

110. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

111. *Flags of Truce.* The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

112. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such a flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

113. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

114. If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is

its sacredness, that while its abuse is an especially heinous offence, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

115. *Hospitals.* It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles, when hospitals are situated within the field of the engagement.[1]

116. Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared.

An honorable belligerent allows himself to be guided by flags, or signals of protection, as much as the contingencies and the necessities of the fight will permit.

117. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

118. The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible.

SECTION VII

THE PAROLE

119. Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

120. The term *parole* designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

121. The pledge of the parole is always an individual but not a private act.

122. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom

[1] The flags now used are those provided for by the Geneva Convention. See Appendix B.

within the captor's country or territory, on conditions stated in the parole.

123. Release of prisoners of war by exchange is the general rule; release by parole is the exception.

124. Breaking the parole is punished with death when the person breaking the parole is captured again.

Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

125. When paroles are given and received, there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

126. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

127. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

128. No paroling on the battle-field, no paroling of entire bodies of troops after a battle, and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted or of any value.

129. In capitulations for the surrender of strong places or fortified camps, the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war, unless exchanged.

130. The usual pledge given in the parole is not to serve during the existing war, unless exchanged.

This pledge refers only to the active service in the field, against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

131. If the government does not approve of the parole, the paroled officer must return into captivity; and should the enemy refuse to receive him, he is free of his parole.

132. A belligerent government may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy.

133. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war, or to parole all captured officers if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

134. The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army; and, upon their failure to give it, he may arrest, confine, or detain them.

Section VIII

ARMISTICE—CAPITULATION

135. *Armistice.* An armistice is the cessation of active hostilities for a period agreed upon between belligerents. It must be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.

136. If an armistice be declared, without conditions, it extends no further than to require a total cessation of hostilities along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

137. An armistice may be general, and valid for all points and lines of the belligerents; or special—that is, referring to certain troops or certain localities only.

An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

138. The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace or to prepare during the armistice for a more vigorous

prosecution of the war, do in no way affect the character of the armistice itself.

139. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

140. Commanding officers have the right to conclude armistices binding on the district over which their command extends; but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

141. *Intercourse.* It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

If nothing is stipulated, the intercourse remains suspended, as during actual hostilities.

142. An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

143. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works, as much so as from attacks by main force.

But as there is a difference of opinion among martial jurists whether the besieged have the right to repair breaches or to erect new works of defence within the place during an armistice, this point should be determined by express agreement between the parties.

144. So soon as a capitulation is signed, the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

145. When an armistice is clearly broken by one of the parties, the other party is released from all obligation to observe it.

146. Prisoners taken in the act of breaking an armistice must be treated as prisoners of war, the officer alone being responsible who

gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

147. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice; in the latter case, the war is carried on without any abatement.

SECTION IX

ASSASSINATION

148. *Assassination.* The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies, as relapses into barbarism.

SECTION X

INSURRECTION—CIVIL WAR—REBELLION

149. *Insurrection.* Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

150. *Civil War.* Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

151. *Rebellion.* The term *rebellion* is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions or provinces of the same which seek to

throw off their allegiance to it, and set up a government of their own.

152. When humanity induces the adoption of the rules of regular war towards rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government towards rebels the ground of their own acknowledgment of the revolted people as an independent power.

153. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war-taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war towards rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties.

154. Treating in the field the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high-treason, and from treating them accordingly, unless they are included in a general amnesty.

155. All enemies in regular war are divided into two general classes—that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion, without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy, without being bodily forced thereto.

156. Common justice and plain expediency require that the mili-

tary commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war, as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, subjecting them to a stricter police than the non-combatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him, that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide.

157. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason.

APPENDIX B

THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE SICK AND WOUNDED OF ARMIES IN THE FIELD[1]

Character and Purpose

THE treatment of the sick and wounded in war is now largely regulated by the requirements of the Geneva Convention of August 22, 1864, the operation of which has been extended to hostilities at sea by the Additional Articles of October 10, 1868, and by the Convention in respect to the rules of maritime warfare which were adopted by the Peace Conference at The Hague in 1899. Nearly all civilized states are now parties to the operation of these agreements, the efficiency of which, as agencies for the amelioration of the condition of the sick and wounded, has been fully established in the great international conflicts which have taken place during the generation that has elapsed since their original adoption.

[1] The Convention proper was signed at Geneva, Switzerland, August 2, 1864. It was signed by representatives of the following powers—*i.e.*, the Swiss Confederation, Baden, Belgium, Denmark, Spain, France, Hesse, Italy, the Netherlands, Portugal, Prussia, and Würtemberg. The ratifications of the contracting parties were exchanged at Geneva on June 22, 1865. In accordance with the invitation contained in the Ninth Article of the Convention, the following powers acceded to the Convention at various dates between 1864 and 1880. These were: Sweden, December 13, 1864; Greece, January 5–17, 1865; Great Britain, February 18, 1865; Mecklenburg-Schwerin, March 9, 1865; Turkey, July 5, 1865; Würtemberg, June 2, 1866; Hesse, June 22, 1866; Bavaria, June 30, 1866; Austria, July 21, 1866; Russia, May 10–22, 1867; Persia, December 5, 1874; Roumania, November 18–30, 1874; Salvador, December 30, 1874; Montenegro, November 17–29, 1875; Servia, March 24, 1876; Bolivia, October 16, 1879; Chili, November 15, 1879; Argentine Republic, November 25, 1879; Peru, April 22, 1880; United States, March 1, 1882.

For reports and discussions in respect to the operations of the Convention in time of war, see vol. iv. Revue de Droit International, p. 325; vol. xviii. Ibid. p. 545; vol. xiv. Ibid. p. 633; vol. xx. Ibid. p. 624; vol. xxi. Ibid. pp. 88, 89; vol. xxvi. Ibid. pp. 9, 25, 38, 47, 348; vol. xxix. Ibid. pp. 110, 112, 318, 320, 571, 576.

It is the purpose of these conventions to ameliorate the condition of individuals of the belligerent armies who have been placed *hors de combat* by disease or wounds. With the projectiles or other instruments by means of which the wounds are inflicted, and with the sanitation of armies and navies, the agreements above referred to have nothing to do. These are questions pertaining to the operations of war which are regulated in part by declarations and other international agreements, and in part by the rules and usages of war which have been generally accepted by civilized states, and are habitually applied by them in the conduct of hostilities on land and sea. The rules of the Geneva Convention, and other undertakings of like character, become operative only when individual combatants have been disabled by wounds or disease. Their effect is to confer certain privileges and immunities upon the sick and wounded, as a class, and to secure to the places in which they are collected and cared for, and to the persons who attend them, as complete an immunity from the effects of hostile operations as it is possible to accord them under the circumstances of each particular case. Of the nature and extent of the immunity to be accorded, each belligerent is to be the judge, in so far as his own operations are concerned; and in the conduct of those operations he must weigh, on the one hand, the strict necessities of the military situation, and, on the other, the imperative demands of suffering humanity and the solemn obligations of treaties entered into with a view to ameliorate the hardships of war in respect to individual combatants who by the casualty of war are no longer able to assist in its prosecution.

Field of Operation. The requirements of the Convention have no operation upon the battle-field proper during the pendency of the action. This is because of the impossibility of affording protection, within the zone of fire, to individuals wearing the distinctive badge of the society; indeed, since the adoption of magazine small-arms and quick-firing guns in modern armies, the zone of fire has become so deadly that it has become practically impossible to attempt to remove the wounded from the field during the progress of the action. If the flag of the society is in view, however, as in the case of the bombardment of a fortified place, or on the battle-field itself after the action has ceased, or has shifted to another part of the field, good faith requires a belligerent to use his utmost endeavors to cause it to be respected. The opposing belligerent is under an

equal obligation to see to it that the distinctive flag of the convention is not abused or used for an illegitimate purpose.

The Convention itself is silent in respect to the dividing-line between the battle-field proper and the zone within which its terms become applicable to the sick and wounded and to the places in which they are collected and cared for. The terms of the first article of the original instrument, however, that "ambulances and military hospitals shall be acknowledged to be neuter," have given occasion for an interpretation of the agreement in this regard which has been generally acted upon by the civilized powers, and which may be stated as follows: At such a distance in rear of the firing-line as it is possible to find reasonable shelter from the fire of the enemy, and its successive supporting formations, what are called the first dressing-stations are established, where the wounded are collected with a view to receiving surgical attention before they are transported to the "ambulances and military hospitals" which are neutralized by the express terms of the Convention. In front of the line thus rudely determined the Convention is inoperative; behind it, where the ambulances and field hospitals have been established, its terms are fully applicable to, and obligatory upon, both belligerents. In rear of the line so established the immunity is, or should be, complete; in front of it the wounded are protected during the continuance of the action, not by the terms of the Geneva Convention, but by the rules of international law. Those rules forbid, first, the use of instruments of war which inflict wounds of needless or unnecessary cruelty; and, secondly, the infliction of any injury whatever upon a person already *hors de combat*. They convert the right to kill into the duty to save, the power to inflict injury into an obligation to relieve suffering; and require that each belligerent shall accord to the wounded of the enemy the same measure of relief that is extended to his own.

Restrictions upon its Operation. While the terms of the Convention confer an extensive immunity upon hospitals and ambulances, that immunity is withdrawn if they are used for hostile purposes, or are occupied by a military force. This clause operates to inflict some hardship upon the sick and wounded, as the protection of the Convention is withdrawn, even in the case where a mere police or provost guard is established in an ambulance or hospital with a view to protect its inmates from robbery or spoliation. Although hospitals and ambulances are expressly exempted from capture by the terms

of the Convention, hospital and medical property is not so exempt, and may be captured by either belligerent. Hospital ships, which were liable to capture by the terms of the Convention of October 10, 1888, were exempted from belligerent seizure by the terms of The Hague Convention of 1899. Although ambulances and hospitals are declared to be neutral, their technical control and management pass by the fact of occupation to the occupying belligerent, and, so long as they continue to be used for the care of the sick and wounded, the classes, or cases to be cared for, in a particular establishment are determined by the belligerent in whose control they are for the time being.[1]

Art. I. Ambulances and military hospitals shall be acknowledged to be neuter, and as such shall be protected and respected by belligerents so long as any sick or wounded may be therein. Such neutrality shall cease if the ambulances or hospitals should be held by a military force.

Art. II. Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality while so employed, and so long as there remain any wounded to bring in or to succor.

Art. III. The persons designated in the preceding article may, even after occupation by the enemy, continue to fulfil their duties in the hospital or ambulance which they serve, or may withdraw in order to rejoin the corps to which they belong.

Under such circumstances, when these persons shall cease from their functions, they shall be delivered by the occupying army to the outposts of the enemy.

Art. IV. As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property.

Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

Art. V. Inhabitants of the country who may bring help to the

[1] For discussions of the terms of the several conventions having for their object the amelioration of the condition of the sick and wounded in time of war, see Bluntschli, pp. 586–592; IV Calvo, §§ 2161–2165; II Ferguson, §§ 293–295; Heffter, § 126, note; Risley, pp. 132, 133; Hall, §§ 130, 187; I Guelle, pp. 144–186.

wounded shall be respected, and shall remain free. The generals of the belligerent powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and the neutrality which will be the consequence of it.

Any wounded man entertained and taken care of in a house shall be considered a protection thereto. Any inhabitant who shall have entertained wounded men in his house shall be exempted from the quartering of troops, as well as from a part of the contributions of war which may be imposed.

Art. VI. Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong.

Commanders-in-chief shall have the power to deliver immediately, to the outposts of the enemy, soldiers who have been wounded in an engagement, when circumstances permit this to be done, and with the consent of both parties.

Those who are recognized, after their wounds are healed, as incapable of serving, shall be sent back to their own country.

The others may also be sent back, on condition of not bearing arms during the continuance of the war.

Evacuations, together with the persons under whose direction they shall take place, shall be protected by an absolute neutrality.

Art. VII. A distinctive and uniform flag shall be adopted for hospitals, ambulances, and evacuations. It must on every occasion be accompanied by the national flag. An arm-badge (brassard) shall also be allowed for individuals neutralized, but the delivery thereof shall be left to military authority.

The flag and arm-badge shall bear a red cross on a white ground.

Art. VIII. The details of execution of the present Convention shall be regulated by the commanders-in-chief of belligerent armies, according to the instructions of their respective governments, and in conformity with the general principles laid down in this Convention.

Art. IX. The high contracting powers have agreed to communicate the present Convention to those governments which have not found it convenient to send plenipotentiaries to the International Convention at Geneva, with an invitation to accede thereto; the protocol is for that purpose left open.

Art. X. The present Convention shall be ratified, and the ratifications exchanged at Berne, in four months, or sooner if possible.

ADDITIONAL ARTICLES

Art. I. The persons designated in Article II. of the Convention shall, after the occupation by the enemy, continue to fulfil their duties to the sick and wounded, according to their wants, in the ambulance or hospital which they serve. When they request to withdraw, the commander of the occupying troops shall fix the time of departure, which he shall only be allowed to delay for a short time in case of military necessity.

Art. II. Arrangements will have to be made by the belligerent powers to assure to the neutralized person fallen into the hands of the army of the enemy the entire enjoyment of his salary.

Art. III. Under the conditions provided for in Articles I. and IV. of the Convention, the name "ambulance" [1] applies to field hospitals and other temporary establishments, which follow the troops on the field of battle to receive the sick and wounded.

Art. IV. In conformity with the spirit of Article V. of the Convention, and to the reservations contained in the protocol of 1864, it is explained that for the appointment of the charges relative to the quartering of troops, and of the contributions of war, account only shall be taken in an equitable manner of the charitable zeal displayed by the inhabitants.

Art. V. In addition to Article VI. of the Convention, it is stipulated that, with the reservation of officers whose detention might be important to the fate of arms, and within the limits fixed by the second paragraph of that article, the wounded who may fall into the hands of the enemy shall be sent back to their country, after they are cured, or sooner if possible, on condition, nevertheless, of not again bearing arms during the continuance of the war.

Art. VI. The boats which, at their own risk and peril, during and after an engagement, pick up the shipwrecked or wounded, or which, having picked them up, convey them on board a neutral or hospital ship, shall enjoy, until the accomplishment of their mission, the character of neutrality, as far as the circumstances of the engagement and the position of the ships engaged will permit.

[1] This interpretation is of especial importance in the United States, where the term "ambulance" is generally applied to a vehicle for the transportation of the sick and wounded.

The appreciation of these circumstances is intrusted to the humanity of all the combatants. The wrecked and wounded thus picked up and saved must not serve again during the continuance of the war.

Art. VII. The religious, medical, and hospital staff of any captured vessel are declared neutral, and, on leaving the ship, may remove the articles and surgical instruments which are their private property.

Art. VIII. The staff designated in the preceding article must continue to fulfil their functions in the captured ship, assisting in the removal of the wounded made by the victorious party; they will then be at liberty to return to their country, in conformity with the second paragraph of the first additional article.

The stipulations of the second additional article are applicable to the pay and allowance of the staff.

Art. IX. The military hospital ships remain under martial law in all that concerns their stores; they become the property of the captor, but the latter must not divert them from their special appropriation during the continuance of the war.

Art. X. Any merchantman, to whatever nation she may belong, charged exclusively with removal of sick and wounded, is protected by neutrality, but the mere fact, noted on the ship's books, of the vessel having been visited by an enemy's cruiser, renders the sick and wounded incapable of serving during the continuance of the war. The cruiser shall even have the right of putting on board an officer in order to accompany the convoy, and thus verify the good faith of the operation.

If the merchant ship also carries a cargo, her neutrality will still protect it, provided that such cargo is not of a nature to be confiscated by the belligerent.

Art. XI. Wounded or sick sailors and soldiers, when embarked, to whatever nation they belong, shall be protected and taken care of by their captors.

Their return to their own country is subject to the provisions of Article VI. of the Convention, and of the Additional Article V.

Art. XII. The distinctive flag to be used with the national flag, in order to indicate any vessel or boat which may claim the benefit of neutrality, in virtue of the principles of this Convention, is a white flag with a red cross. The belligerents may exercise

in this respect any mode of verification which they may deem necessary.

Military hospital ships shall be distinguished by being painted white outside, with green strake.

Art. XIII. The hospital ships which are equipped at the expense of the aid societies recognized by the governments signing this Convention, and which are furnished with a commission emanating from the sovereign, who shall have given express authority for their being fitted out, and with a certificate from the proper naval authority that they have been placed under his control during their fitting-out and on their final departure, and that they were then appropriated solely to the purpose of their mission, shall be considered neutral, as well as the whole of their staff. They shall be recognized and protected by the belligerents.

They shall make themselves known by hoisting, together with their national flag, the white flag with a red cross. The distinctive mark of their staff, while performing their duties, shall be an armlet of the same colors. The outer painting of these hospital ships shall be white, with red strake.

These ships shall bear aid and assistance to wounded and wrecked belligerents, without distinction of nationality.

They must take care not to interfere in any way with the movements of the combatants. During and after the battle they must do their duty at their own risk and peril.

The belligerents shall have the right of controlling and visiting them; they will be at liberty to refuse their assistance, to order them to depart, and to detain them if the exigencies of the case require such a step.

The wounded and wrecked picked up by these ships cannot be reclaimed by either of the combatants, and they will be required not to serve during the continuance of the war.

Art. XIV. In naval wars any strong presumption that either belligerent takes advantage of the benefits of neutrality, with any other view than the interest of the sick and wounded, gives the other belligerent, until proof to the contrary, the right of suspending the Convention as regards such belligerent.

Should this presumption become a certainty, notice may be given to such belligerent that the Convention is suspended with regard to him during the whole continuance of the war.

Art. XV. The present act shall be drawn up in a single original copy, which shall be deposited in the archives of the Swiss Confederation.[1]

Application of the Rules of the Convention by the United States during the War of 1898 *with Spain.* With a view to secure observance of the rules of the Convention, the United States Government, on May 17, 1898, issued orders to its forces in the field, containing such extracts from the text of the Convention as were necessary to insure its correct and uniform execution. These instructions were accompanied by the following regulations:

"1. All persons connected with the Medical Department of the army in the field, or referred to in Article II. of the Treaty, shall wear habitually during the war, on the left sleeve of the coat, midway between the shoulder and elbow, a brassard, or arm-badge, consisting of a red cross on a white ground.

"2. All hospitals, ambulances, and field stations of the Medical

[1] The Additional Articles were agreed to and signed at Geneva on October 20, 1868, by the duly accredited representatives of the following powers — *i. e.*, Great Britain, Austria, Baden, Bavaria, Belgium, Denmark, France, Italy, the Netherlands, the North German Confederation, Sweden, Norway, Switzerland, Turkey, and Würtemberg. The Convention was acceded to by the United States on March 1, 1882.

In the published English text, from which this version of the Additional Articles is taken, the following paragraph appears in continuation of Article IX. It is not found in the original French text adopted by the Geneva Conference, October 20, 1868.

"The vessels not equipped for fighting which, during peace, the government shall have officially declared to be intended to serve as floating hospital ships, shall, however, enjoy during the war complete neutrality, both as regards stores, and also as regards their staff, provided their equipment is exclusively appropriated to the special service on which they are employed.

"By an instruction sent to the United States minister at Berne, January 20, 1883, the right is reserved to omit this paragraph from the English text, and to make any other necessary corrections, if at any time hereafter the Additional Articles shall be completed by the exchange of the ratifications thereof between the several signatory and adhering powers. The President of the United States, in his proclamation announcing the accession of that power to the Geneva Convention, reserves the promulgation of the Additional Articles until the exchange of the ratifications thereof, between the several contracting states, shall have been effected, and the said additional articles shall have acquired full force and effect as an international treaty." — Statutes at Large of the United States, 1882, 1883, pp. 126–137. For correspondence in respect to the adoption of the red crescent by Turkey, see For. Rel. of the U. S. 1877, p. 616. For papers in relation to the practical working of the Convention, see vol. xix. Revue de Droit International, p. 77; vol. xxiii. Ibid. pp. 88–90; vol. xxvi. Ibid. pp. 9–51.

Department will habitually display the Red Cross flag accompanied by the national flag.

"3. Permits, in duplicate, for civilians to be present with the army, in the service of the Medical Department, may be given by authority of a division commander; one copy of the permit will be retained by the person neutralized, and its duplicate should be forwarded promptly to the chief surgeon of the army.

"4. Persons neutralized under this authority will report themselves at once to the Chief Surgeon of Division for instructions.

"5. The wearing of the arm brassard by any person not officially neutralized is prohibited."[1]

Hospital Ships. The following instructions were also promulgated in respect to the hospital ship *Relief:*

"The steamship recently purchased for the use of the Medical Department of the army as a hospital ship will be named the *Relief.* In accordance with the terms of the Geneva Convention, the Geneva cross flag will be carried at the fore whenever the national flag is flown, and the neutrality of the vessel will at all times be preserved

"No guns, ammunition, or articles contraband of war, except coal or stores necessary for the movement of the vessel, shall be placed on board; nor shall the vessel be used as a transport for the carrying of despatches, officers or men not sick or disabled, other than those belonging to the Medical Department."[2]

Similar instructions were also issued by the United States Navy Department

[1] General Orders No. 47, A. G. O. 1898.

[2] General Orders No. 53, A. G. O. 1898.

APPENDIX C

THE DECLARATION OF PARIS

DECLARATION RESPECTING MARITIME LAW, SIGNED BY THE PLENIPOTENTIARIES OF GREAT BRITAIN, AUSTRIA, FRANCE, PRUSSIA, RUSSIA, SARDINIA, AND TURKEY, ASSEMBLED IN CONGRESS AT PARIS, APRIL 16, 1856

"The Plenipotentiaries who signed the Treaty of Paris of the 30th of March, 1856, assembled in conference,—Considering:

"That maritime law, in time of war, has long been the subject of deplorable disputes;

"That the uncertainty of the law, and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

"That it is consequently advantageous to establish a uniform doctrine on so important a point;

"That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their governments are animated than by seeking to introduce into international relations fixed principles in this respect:

"The above-mentioned Plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn declaration:

"1. Privateering is, and remains abolished.

"2. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

"4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

"The governments of the undersigned Plenipotentiaries engage to

bring the present Declaration to the knowledge of the states which have not taken part in the Congress of Paris, and to invite them to accede to it.

"Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentiaries doubt not that the efforts of their governments to obtain the general adoption thereof will be crowned with full success.

"The present Declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it.

"Done at Paris, April 16, 1856."

This Declaration of the six powers of the Paris conference was communicated to other states, and it was stated, in a memorandum of the French Minister of Foreign Affairs to the Emperor, dated June 12, 1858, that the following powers had signified their full allegiance to the four principles—viz., Baden, Bavaria, Bremen, Brazil, the Duchy of Brunswick, Chili, the Argentine Republic, the Germanic Confederation, Denmark, the two Sicilies, Ecuador, the Roman states, Greece, Guatemala, Hayti, Hamburg, Hanover, the two Hesses, Lübeck, Mecklenburg-Strelitz, Mecklenburg-Schwerin, Nassau, Oldenburg, Parma, the Netherlands, Peru, Portugal, Saxony, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar, Sweden, Switzerland, Tuscany, and Würtemberg. The executive government of Uruguay also gave its full assent to all the four principles, subject to the ratification of the legislature. Spain and Mexico adopted the last three as their own, but, on account of the first article, declined acceding to the entire Declaration. The United States adopted the second, third, and fourth propositions, independently of the first, offering, however, to adopt that also, with the following amendment, or additional clause, "and the private property of subjects or citizens of a belligerent on the high seas, shall be exempt from seizure by the public armed vessels of the other belligerent except it be contraband." The proposition thus extended has been accepted by Russia, and some other states have signified their approbation of it. There is reason to hope that all the maritime nations of Europe will eventually adopt the extension.[1] The reasons advanced by the United States for declining to accept the entire Declaration have been fully discussed elsewhere.[2]

[1] II Halleck, p. 17.

[2] *Ante*, p. 384. For a discussion of the principles of the Declaration in the English Parliament, see For. Rel. of the United States, 1875, pp. 616–631.

APPENDIX D

THE DECLARATION OF ST. PETERSBURG

In December, 1868, a conference of delegates, representing nineteen states, assembled at St. Petersburg, upon the invitation of the Russian Government, for the purpose of considering the existing rules of war. This body, which has become known as the International Military Commission, completed its labors on November 4–16 of the same year. As a result of its deliberations, the following Declaration was agreed to and signed by the duly authorized representatives of the states participating in the conference:[1]

"Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

"That the only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy;

"That for this purpose it is sufficient to disable the greatest possible number of men;

"That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

"That the employment of such arms would, therefore, be contrary to the laws of humanity;

"The contracting parties engage mutually to renounce, in case of war among themselves, the employment, by their military or naval forces, of any projectile of less weight than four hundred grammes[2] which is explosive, or is charged with fulminating or inflammable substances.

[1] Austria, Bavaria, Belgium, Denmark, France, Great Britain, Greece, Italy, the Netherlands, Persia, Portugal, Prussia, the North German Confederation, Russia, Sweden, and Norway, Switzerland, Turkey, and Würtemberg.

[2] Fourteen ounces avoirdupois.

" They agree to invite all the states which have not taken part in the deliberations of the International Military Commission, assembled at St. Petersburg, by sending delegates thereto, to accede to the present engagement.

" This engagement is obligatory only upon the contracting or acceding parties thereto, in case of war between two or more of themselves; it is not applicable with regard to non-contracting powers, or powers that shall not have acceded to it.

" It will also cease to be obligatory from the moment when, in a war between contracting or acceding parties, a non-contracting party, or a non-acceding party, shall join one of the belligerents.

" The contracting or acceding parties reserve to themselves the right to come to an understanding hereafter whenever a precise proposition shall be drawn up, in view of future improvements which may be effected in the armament of troops, in order to maintain the principles which they have established, and to reconcile the necessities of war with the laws of humanity."

APPENDIX E

THE INTERNATIONAL PEACE CONFERENCE AT THE HAGUE

(*May* 18 *to July* 29, 1899)

As a result of the deliberations of the International Peace Conference, convened in pursuance of an invitation addressed by the Imperial Government of Russia to the principal states of the civilized world, three treaties or conventions were entered into and three formal declarations were adopted by the signatory powers. In addition to this action in the way of obligatory conventions, several important resolutions were agreed to and submitted to the signatory powers for subsequent consideration. The following are the principal results of the conference:

I. A Convention for the pacific adjustment of international disputes.[1]

II. A Convention in respect to the laws and usages of war on land.[2]

III. A Convention for the adaptation of the rules of maritime warfare to the principles of the Geneva Convention of August 22, 1864.[3]

IV. Three declarations in respect to the following subjects;[4]

(*a.*) The prohibition of the use of projectiles or explosives from balloons, or by other similar methods.

(*b.*) The prohibition of the employment of projectiles which have for their sole purpose to diffuse asphyxiating or other deleterious gases.

(*c.*) The prohibition of bullets which expand or flatten easily in the human body; such as bullets with hard jackets, which do not entirely cover the projectile, or are provided with incisions.

[1] For the text of this Convention, see pp. 541–551, *post.*

[2] For the text of this Convention, see pp. 551–561, *post.*

[3] For the text of this Convention, see pp. 561–564, *post.*

[4] For the text of these Declarations, see pp. 564–565, *post.*

V. Six resolutions of international importance were also agreed to by the Conference.[1]

AGREEMENT FOR THE PEACEABLE ADJUSTMENT OF INTERNATIONAL DISPUTES[2]

TITLE I.—MAINTENANCE OF THE GENERAL PEACE

Art. I. With a view to prevent, as far as possible, the resort to force in the relations of states, the signatory powers agree to use their utmost endeavors to secure the peaceful settlement of international differences.

TITLE II.—GOOD OFFICES AND MEDIATION

Art. II. In cases of serious disagreement or conflict, before appealing to arms the signatory powers agree to resort, as far as circumstances will permit, to the good offices or mediation of one or more friendly powers.

Art. III. Independently of this recourse, the signatory parties deem it expedient that one or more powers, strangers to the dispute, should, of their own initiative, in so far as circumstances favor it, tender their good offices or mediation to the litigant states. The right of tendering good offices, or mediation, belongs to the powers who are strangers to the dispute, even during the progress of hostilities. The exercise of this right can never be considered, by either of the litigant parties, as an unfriendly act.

Art. IV. The rôle of mediator consists in the reconciliation of opposing claims and the removal of ill feeling to which the dispute between the states may have given rise.

[1] For the text of these Resolutions, see p. 566, *post*.

[2] The Arbitration Convention was signed by thirty-six plenipotentiaries representing sixteen states of the civilized world; the signatory parties being France, Spain, Portugal, Russia, Belgium, Holland, Denmark, Sweden and Norway, Greece, Bulgaria, Roumania, Montenegro, Persia, Siam, the United States, and Mexico. The principal non-signatory states were Great Britain, Germany, Austria, Italy, Turkey, China, Japan, and the Spanish-American states of South and Central America. No reason is assigned for their failure to sign, nor does it anywhere appear that any of them cherish the intention of adhering to the Convention at any time in the future. The delegates representing the United States signed the Convention with a reservation which appears elsewhere (p. 262, *ante*), but which in no way militates against the complete acceptance of the Convention by the government which they represented.

Art. V. The functions of a mediator cease the instant it is declared by one of the litigant powers, or by the mediator himself, that the measures of conciliation proposed by him are not accepted.

Art. VI. Good offices and mediation, either upon the request of the litigant states or upon the initiative of powers foreign to the dispute, have exclusively the character of advice; they never have obligatory force.

Art. VII. The acceptance of mediation can never have the effect, save in the event of an agreement to the contrary, to interrupt, delay, or impede mobilization, or other measures preparatory to war. If mediation occurs after the opening of hostilities, save in the case of a contrary agreement, it does not interrupt the existing military operations.

Art. VIII. The signatory powers agree in recommending the application, in circumstances which permit it, of special mediation under the following form:

In case of a dispute seriously compromising peace, the states in conflict choose, respectively, one power to whom they intrust the task of entering into direct communication with the power chosen by the other party, with a view to prevent the rupture of peaceful relations.

During the existence of this commission, the duration of which, save in the case of stipulations to the contrary, shall not exceed thirty days, the litigant states are to refrain from all direct communication with each other, in respect to the cause of difference, which is to be regarded as referred to the exclusive consideration of the mediating powers. The latter are to put forth every endeavor to adjust the difference. In case of definite rupture of friendly relations, these powers continue to be jointly charged with the duty of profiting by every opportunity to re-establish peace.

TITLE III.—INTERNATIONAL COMMISSIONS OF INQUIRY

Art. IX. In international differences affecting neither honor nor essential interests, and growing out of a difference of opinion as to questions of fact, the signatory powers deem it expedient that the parties who may not be able to come to an agreement in the diplomatic way, should, as far as circumstances will permit, institute an International Commission of Inquiry charged with facilitating the

solution of such differences by clearing up such questions of fact by an impartial and conscientious investigation.

Art. X. International Commissions of Inquiry are constituted by special agreement between the litigant parties. The convention of inquiry sets forth the facts to be investigated and the extent of the commissioners' powers. It regulates procedure. The Commission has authority to hear both sides of the controversy. The order of, and the delays to be allowed in, presentation of the case on either side, in so far as they are not provided for in the convention of inquiry, are determined by the commission itself.

Art. XI. International Commissions of Inquiry are formed, save in the case of contrary stipulations, in the manner determined by Article XXXII. of this Convention.

Art. XII. The litigant parties pledge themselves to furnish the International Commission of Inquiry, in the fullest measure that they shall regard as possible, every means and facility necessary to the complete and exact understanding of the facts in question.

Art. XIII. The International Commission of Inquiry renders a report to the litigant powers signed by all of the members of the Commission.

Art. XIV. The report of the International Commission of Inquiry, which is limited to a verification of facts, has in no respect the character of an arbitral judgment. It leaves to the litigant powers full liberty as to the result that may be imparted to such verification.

TITLE IV.—INTERNATIONAL ARBITRATION

CHAPTER I.—ARBITRAL JUSTICE

Art. XV. International arbitration has for its purpose the settlement of disputes between states by judges of their own choice and upon a basis of respect for law.

Art. XVI. In questions of a judicial character, and especially in questions of the interpretation and application of international agreements, arbitration is recognized by the signatory powers as the most effective, and at the same time the most equitable, method of adjusting disputes which have not been settled in the diplomatic way.

Art. XVII. The arbitral convention is agreed to for disputes already existing, or for future controversies. It can apply to all disputes or to disputes of a limited class.

Art. XVIII. The arbitral convention implies the engagement to submit in good faith to the arbitral decision.

Art. XIX. Independently of general or special treaties which expressly stipulate for a reference to arbitration on the part of the signatory powers, these powers reserve to themselves the right, either before the ratification of the present agreement, or subsequently thereto, to conclude new agreements, general or special in character, with a view to extend compulsory arbitration to all cases which they shall judge possible to submit to it.

Chapter II.—Permanent Court of Arbitration

Art. XX. To the end that immediate recourse to arbitration may be facilitated, in respect to international differences which cannot be adjusted in the diplomatic way, the signatory powers agree to organize a Permanent Court of Arbitration, accessible at all times, and performing its functions, save in the case of contrary stipulations, in accordance with the rules of procedure set forth in the present Convention.

Art. XXI. The Permanent Court shall have cognizance of all cases of arbitration, unless there may be an agreement between the parties for the establishment of a special tribunal.

Art. XXII. An International Bureau, established at The Hague, serves as a Registry for the Court; this Bureau is the intermediary of communications relative to its meetings. It preserves the records and is charged with the disposition of all administrative matters. The signatory powers agree to communicate to the Bureau at The Hague a certified copy of every stipulation in respect to arbitration occurring between them, and of every arbitral decision affecting them which may be reached by special tribunals. They agree to communicate to the Bureau, in like manner, the laws, regulations, and documents which evidence the fact that the judgments reached by the Court have been carried into final effect.

Art. XXIII. Each signatory power shall designate, within the three months following the ratification of this agreement, four persons at the most, of recognized capacity in questions of international law, who enjoy the highest moral character and are willing to accept the functions of arbitrators. The names of the persons so designated shall be entered as members of the Court, upon a list

which shall be communicated by the Bureau to all of the signatory powers. Every modification in the list of arbitrators is brought by the agency of the Bureau to the attention of the signatory powers. Two or more of the powers may agree to the designation in common of one or more members. The same person may be designated by different powers. The members of the Court are appointed for a term of six years. Their appointments may be renewed. In the event of the death or retirement of a member of the Court, succession is regulated in accordance with the method fixed for his appointment.

Art. XXIV. When the signatory powers desire to apply to the Permanent Court for the adjustment of a dispute arising between them, the choice of arbitrators called to form the tribunal having jurisdiction to decide the dispute must be made from the general list of members of the Court.

In case of a failure to constitute an arbitral tribunal by the immediate agreement of the parties, the following procedure will be resorted to. Each party names two arbitrators, and the latter choose an umpire. In case of an equality of votes, the choice of an umpire is left to a third power designated by agreement between the parties. If no agreement is reached upon this subject, each party designates a different power, and the selection of an umpire is made by agreement of the powers thus designated. The tribunal being thus composed, the parties notify the Bureau of their determination to appeal to the Court, and communicate the names of the arbitrators. The arbitral tribunal shall meet at the date fixed by the parties. The members of the Court, in the exercise of their functions, and while outside the territories of their own states, shall enjoy diplomatic privileges and immunities.

Art. XXV. The arbitral tribunal shall sit ordinarily at The Hague. The place of sitting, save in a case of necessity, can only be changed by the tribunal with the consent of the parties.

Art. XXVI. The International Bureau at The Hague is authorized to place its organization and premises at the disposal of the signatory powers for the use of any special tribunal of arbitration. The jurisdiction of the Permanent Court may be extended, under the conditions prescribed in these regulations, to disputes existing between non-signatory powers or between signatory and non-signatory powers, if the parties agree to have recourse to this jurisdiction.

Art. XXVII. The signatory powers regard it as a duty, in the event of an acute difference threatening to break forth between two or more of them, to draw their attention to the fact that the Permanent Court is open. Accordingly, they declare that the fact of inviting the attention of the parties in dispute to the provisions of the present Convention, and the advice given, in the superior interest of peace, to address the Permanent Court, can be considered only as an act of friendship.[1]

Art. XXVIII. A Permanent Administrative Council, composed of the diplomatic representatives of the signatory powers at The Hague and the Minister of Foreign Affairs of the Netherlands, who shall exercise the functions of President, shall be established in this city as soon as possible after the ratification of this instrument by at least nine powers.

This Council shall be charged with the establishment and organization of the International Bureau, which shall remain under its direction and supervision. It shall notify the powers of the constitution of the Court, and shall provide for its installation. It shall draw up its rules of order, as well as all other necessary regulations. It shall decide all administrative questions that may arise concerning the operations of the Court. It shall have full power in respect to the appointment, suspension, or dismissal of officers or employees of the Bureau. It shall fix their salaries and emoluments, and shall control the general expenses. The presence of five members shall constitute a quorum for the transaction of business. Decisions are reached by a majority of votes. The Council communicates to the powers without delay the rules adopted by it. It addresses to them each year a report of the work of the Court, of the operation of its administrative service, and its expenses.

Art. XXIX. The expenses of the Bureau shall be defrayed by the

[1] The Arbitration Convention was signed by the representatives of the United States with the following qualification, having especial reference to Article XXVII.: "The delegation of the United States of America, in signing the Convention regulating the peaceable settlement of international conflicts, as proposed by the International Peace Conference, make the following declarations: Nothing contained in this Convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions or internal administration of any foreign state; nor shall anything contained in the said Convention be construed to imply a relinquishment by the United States of America of its traditional attitude towards purely American questions."

signatory powers in the proportion established for the International Bureau of the Universal Postal Union.

Chapter III.—Arbitral Procedure

Art. XXX. With a view to favor the development of arbitration, the signatory powers have agreed upon the following rules which shall apply to arbitral procedure, in so far as the parties have not agreed upon other rules.

Art. XXXI. The powers who have recourse to arbitration sign a special undertaking (arbitral agreement), in which the object of the litigation, as well as the extent of the powers of the arbitrators, are clearly defined. This undertaking implies an engagement of the parties to submit in good faith to the arbitral decision.

Art. XXXII. The arbitral functions may be conferred upon one arbitrator, or upon several arbitrators, designated by the parties at their discretion, or chosen by them from among the members of the Permanent Court of Arbitration established by this instrument. In default of the constitution of the tribunal by an immediate agreement of the parties, the procedure shall be as follows: Each party names two arbitrators, and the latter, acting together, choose an umpire. In case of an equality of votes, the selection of an umpire is intrusted to a third power, designated by agreement of the parties. If no agreement is reached on this point, each party designates a different power, and the selection of an umpire is made by agreement of the powers thus designated.

Art. XXXIII. Where the sovereign or chief of the state is chosen as arbitrator, the arbitral procedure is regulated by him.

Art. XXXIV. The umpire is *ex officio* President of the tribunal; where the tribunal does not include an umpire the tribunal itself names its President.

Art. XXXV. In case of the death or resignation of an arbitrator, or his inability to act for any cause whatever, the vacancy is filled in accordance with the method prescribed for his appointment.

Art. XXXVI. The seat of the tribunal is designated by the parties. In default of any such designation, the tribunal sits at The Hague. The sitting so fixed, save in case of necessity, can be changed by the tribunal only with the consent of the parties.

Art. XXXVII. The parties have the right to appoint delegates or

special agents before the tribunal, charged with the duty of acting as intermediaries between themselves and the tribunal. In addition they are authorized to have counsellors or advocates, named by themselves, and charged with the defence of their rights and interests before the tribunal.

Art. XXXVIII. The tribunal decides upon the choice of languages to be used in its proceedings, and which shall be authorized to be employed in its presence.

Art. XXXIX. Arbitral procedure comprehends, as a general rule, two distinct phases: preliminary examination and discussion. Preliminary examination consists in the communication made by the respective agents to the members of the tribunal and the adverse party of all written and printed documents containing the matters relied upon by them in support of their cases. This presentation shall be made in such order and sequence, and subject to such delays, as may be determined upon by the tribunal in virtue of Article XLIX. Discussion consists in the oral development of the matters submitted to the tribunal by the parties.

Art. XL. Every document presented by either party shall be communicated to the other.

Art. XLI. The discussions are directed by the President. They are made in public only, in pursuance of a decision of the tribunal made with the consent of the parties. They are entered on the record of proceedings by the secretaries named by the President. These records alone have the official character.

Art. XLII. The examination being closed, the tribunal has the right to exclude from the case all new documents or instruments which one of the parties may wish to submit without the consent of the other.

Art. XLIII. The tribunal remains free to take into consideration new documents and instruments to which the agents or counsel of the parties desire to call to its attention. In this case the tribunal may require the production of such documents or instruments, subject to the obligation of making them known to the opposite party.

Art. XLIV. Moreover, the tribunal may require of the agents of the parties the production of all documents, and may ask all necessary explanations. In case of refusal the tribunal makes a note of the fact.

Art. XLV. Agents and counsel of the parties are authorized to

present to the tribunal, orally, all matters which they may deem relevant to the defence of their case.

Art. XLVI. They have the right to note exceptions and incidents. The decisions of the tribunal on these points are final, and can give rise to no subsequent discussion.

Art. XLVII. The members of the tribunal have the right to put questions to the agents and counsel of the parties and to call for explanations of doubtful points. Neither the questions put nor the observations made by the members of the tribunal in the course of the pleadings can be regarded as expressions of the opinion of the tribunal, in general or of its individual members.

Art. XLVIII. The tribunal is authorized to determine its competence in the interpretation of the arbitral agreement, as well as in the interpretation of other treaties which may be appealed to in the case in point, and in the application of the rules of international law.

Art. XLIX. The tribunal has the right to make rules of procedure for the conduct of the litigation, to determine the form of presentation, and the delays in accordance with which each party shall submit his case, and to proceed with all due formality in respect to the production of evidence.

Art. L. The agents and counsel of the parties, having presented all proofs and explanations in support of their respective cases, the President declares the case closed.

Art. LI. The deliberations of the tribunal take place with closed doors. Every decision is reached by a majority of members of the tribunal. The refusal of a member to vote shall be noted in the record.

Art. LII. Reasons are to be assigned for the arbitral judgment, which shall be decided by a majority of members; it is reduced to writing and is signed by every member of the tribunal. Members of the minority may declare their dissent in attaching their signatures to the judgment.

Art. LIII. The arbitral judgment shall be read in a public session of the tribunal, at which the agents and counsel of the parties shall be present, or of which they shall be duly notified.

Art. LIV. The arbitral judgment, duly pronounced and notified to the agents of the litigant parties, decides the dispute finally and without appeal.

Art. LV. Parties may reserve, in the arbitral agreement, the right

to demand a review of the arbitral judgment. In this case, and in the event of there being no stipulation to the contrary, the request will be addressed to the tribunal which has rendered the decision. It can be asked for only upon the discovery of new facts of such a nature that they would have exercised a decisive influence upon the judgment, and which, until the close of the hearing, were unknown either to the tribunal or to the party who demands a revision.

Procedure in review can be instituted only in consequence of a decision of the tribunal especially setting forth the existence of the new facts, and recognizing in them the character contemplated in the preceding paragraph and declaring that the request is received upon that ground. The arbitral agreement determines the limits of time within which the demand for revision shall be made.

Art. LVI. The arbitral judgment is obligatory only upon the parties to the arbitral agreement. When the interpretation of a treaty is in question to which other powers than those in litigation are parties, the latter shall notify the former of the agreement into which they have entered. Each of such powers has the right to be heard at the trial. If one or more of them has taken advantage of the right, the interpretation embodied in the arbitral judgment is equally binding npon them.

Art. LVII. Each party pays its own expenses and an equal share of the expenses of the tribunal.

GENERAL PROVISIONS

Art. LVIII. This Convention shall be ratified with the briefest possible delay. The ratifications shall be deposited at The Hague. On the deposit of each ratification a minute shall be drawn up, of which one copy, properly certified, shall be transmitted, through diplomatic channels, to each of the other powers represented at the International Peace Conference at The Hague.

Art. LIX. Non-signatory powers who were represented at the International Peace Conference may become parties to this Convention. To that end they shall make known their adhesion to the contracting powers by means of a notification in writing addressed to the Government of the Netherlands, by whom it shall be communicated to each of the other contracting powers.

Art. LX. The conditions in accordance with which powers not

represented at the International Peace Conference at The Hague may become parties shall form the subject of a subsequent convention between the contracting powers.

Art. LXI. If it should happen that one of the high contracting powers should disavow this Convention, such disavowal shall become operative only one year after the notification thereof shall have been made in writing to the government of the Netherlands, and immediately communicated by it to each of the other contracting powers. The disavowal shall only affect the notifying power.

Done at The Hague this 29th day of July, 1899, in an original which shall remain on deposit in the archives of the government of the Netherlands, and of which certified copies shall be transmitted, through diplomatic channels, to each of the contracting powers.

RULES CONCERNING THE LAWS AND USAGES OF WAR ON LAND

SECTION I.—BELLIGERENTS

CHAPTER I.—THE BELLIGERENT CHARACTER

Art. I. The laws, rights, and obligations of war apply, not only to the army, but also to militia forces and to bodies of volunteers, which combine the following conditions:

(1) Having at their head a person responsible for his subordinates;

(2) Having a fixed, distinctive badge, recognizable at a distance;

(3) Carrying arms openly; and

(4) Conforming in their operations to the laws and usages of war.

In countries in which the militia or volunteers compose the army, or form a part of it, they are included under the designation of "army."

Art. II. The population of a non-occupied territory who, at the approach of the enemy, take up arms spontaneously, in order to resist the troops of invasion, without having had time to organize in conformity to Article I., shall be considered as belligerents if they observe the laws and usages of war.

Art. III. The military forces of the belligerent parties may be composed of combatants and non-combatants. In case of capture by the enemy both shall be entitled to be treated as prisoners of war.

CHAPTER II.—PRISONERS OF WAR

Art. IV. Prisoners of war are prisoners of the enemy's government, and not of the individuals or corps who have captured them. They are to be treated with humanity. Everything which belongs to them personally, except arms, horses, and military papers, remains their property.

Art. V. Prisoners of war may be interned in any town, fortress, camp, or place whatsoever, under the obligation not to pass beyond certain fixed limits; but they may be confined only as an indispensable measure of security.

Art. VI. The state may employ prisoners of war as laborers, according to their rank and aptitude. These labors shall not be excessive, and shall have no connection with the operations of the war.

Prisoners may be authorized to be employed in the public administration, or by private individuals, or on their own account.

Work done for the state shall be paid for in accordance with the rates of pay allowed to military persons of the national army when engaged upon the same work. When work is done for other departments of the government, or for private individuals, the conditions of labor shall be regulated by agreement with the military authorities.

The pay of prisoners shall be employed to ameliorate their condition, and the surplus, after the expenses of their maintenance have been deducted, shall be paid over to them at the instant of their liberation.

Art. VII. The government in whose power prisoners of war happen to be is charged with their support. In the absence of a special understanding between the belligerents, prisoners of war shall be treated, in respect to food, lodging, and clothing, in the same way as the troops of the government which has captured them.

Art. VIII. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the state in whose power they happen to be. Every act of insubordination authorizes, so far as they are concerned, a resort to the necessary measures of severity. Escaped prisoners, who are retaken before they shall have succeeded in rejoining their own army, or before quitting the territory occupied by the army which shall have captured them, are liable to disciplinary punishment. Prisoners who, after having succeeded in escap-

ing, are again made prisoners, are not liable to any punishment for the previous escape.

Art. IX. Every prisoner of war, if interrogated on the subject, is required to declare his true name and rank, and, in case of infringement of this rule, he may be exposed to a restriction of the benefits accorded to prisoners of war of his class.

Art. X. Prisoners of war are to be liberated on parole, if the laws of their country authorize it, and, in such case, they are obliged, under the guarantee of their personal honor, to perform scrupulously, as well in relation to their own government as in regard to that which has made them prisoners, the engagements which they may have entered into. In the same case, their own government is to refrain from demanding or accepting any service from them contrary to the tenor of the paroles which they have given.

Art. XI. A prisoner of war cannot be compelled to accept his liberty on parole; nor is the enemy's government obliged to accede to the demand of a prisoner of war who claims his release on parole.

Art. XII. Every prisoner of war released on parole who subsequently takes up arms against, and is recaptured by, the government to which he has engaged his honor, or against its allies, forfeits the right to be treated as a prisoner of war and may be brought before its tribunals.

Art. XIII. Individuals who accompany an army without forming an integral part of it, such as correspondents and reporters of newspapers, sutlers and contractors, who fall into the hands of the enemy, and whom the latter deems it expedient to detain, are entitled to be treated as prisoners of war, on condition that they are provided with certificates of identity by the military authority of the army which they accompany.

Art. XIV. There shall be established at the outbreak of hostilities, in each of the belligerent states, and, if there be occasion, in neutral states which shall have received belligerents within their territories, a Bureau of Information in respect to prisoners of war. This bureau, which is charged with replying to all applications concerning prisoners, shall receive from the several branches of the service having jurisdiction of the same all the data necessary to establish the individual record of each prisoner of war. It is to be kept informed as to internments and changes, as well as to deaths and admissions to hospitals.

The Bureau of Information is also to receive, centralize, and transmit to the properly interested parties all articles of personal property, valuables, letters, etc., which shall have been found on the field of battle or left by deceased prisoners in ambulances and hospitals.

Art. XV. Societies for the relief of prisoners of war, regularly established under the laws of their respective countries, whose purpose it is to become the intermediaries of charitable action, shall receive on the part of belligerents, for themselves and for their duly credited agents, every facility within the limits prescribed by military necessity and the rules of administration to effectively accomplish their humane purpose. Delegates of these societies may be admitted to distribute aid in the depots of internment, as well as in the halting-places of prisoners who are being sent back to their own country, by means of a personal permit, issued by proper military authority, and on condition that they take an engagement in writing to submit to all measures of discipline and police that may be prescribed by the latter.

Art. XVI. Bureaus of Information shall be entitled to freedom of transport. Letters, or drafts, and sums of money, as well as postal packages addressed to prisoners of war, or sent by them, shall be exempt from all postal dues, not only in the countries of origin and destination, but also in intermediate countries. Charitable gifts and relief in kind destined for prisoners of war shall be admitted free of import duty, and shall be transported free of cost on railways operated by the state.

Art. XVII. Officers who are prisoners of war shall receive the portion, if any there be, of the pay allowed them, as prisoners of war, by the regulations of their own country, on condition that it be reimbursed by their own government.

Art. XVIII. Every latitude shall be allowed to prisoners of war for the free exercise of religious belief, in which shall be included the right to attend religious service, upon the single condition that they conform to the measures of discipline and police prescribed by the proper military authority.

Art. XIX. Wills of prisoners of war are accepted or drawn up on the same conditions as for soldiers of the national army. The same rules will be followed in all matters concerning documents relating to the identification of the deceased, and to the burial of prisoners of war, regard being had to their rank and grade.

Art. XX. After the conclusion of peace the return of prisoners of war to their own country shall be accomplished with the least possible delay.

Chapter III.—The Sick and Wounded

Art. XXI. The obligations of belligerents in respect to the sick and wounded are regulated by the Geneva Convention of August 22, 1864, except as to the modifications which may be made in that instrument.

Section II.—Hostilities

Chapter I.—Means of Injuring the Enemy—Sieges and Bombardments

Art. XXII. Belligerents are not unlimited as to their choice of means of injuring the enemy.

Art. XXIII. Besides the prohibitions established by special agreements, it is especially forbidden:

(*a.*) To employ poison or poisoned arms.

(*b.*) To kill or wound by treachery individuals belonging to the nation or army of the enemy.

(*c.*) To kill or wound an enemy who, having laid down his arms, or having no longer the means of defending himself, has surrendered unconditionally.

(*d.*) To declare that quarter will not be given.

(*e.*) To employ arms, projectiles, or substances which are calculated to cause unnecessary pain.

(*f.*) To make unlawful use of flags of truce, or the national flag, or military insignia, or uniform of the enemy, or the distinctive signs of the Geneva Convention.

(*g.*) To destroy or seize the property of the enemy, except when such destruction or seizure may be imperiously demanded by the necessities of the war.

Art. XXIV. Stratagems of war and the employment of the means necessary to secure information as to the enemy and the theatre of military operations are lawful.

Art. XXV. It is forbidden to attack or to bombard towns, villages, houses, or dwellings which are not defended.

Art. XXVI. The commander of the attacking troops, before un-

dertaking a bombardment, will, except in case of an open assault, do all that lies in his power to give warning to the authorities.

Art. XXVII. In sieges and bombardments every precaution is to be taken to spare, as much as possible, buildings devoted to religious worship, to the arts or sciences, to charity, and to hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

Art. XXVIII. It is forbidden to give over to pillage even a place taken by assault.

Chapter II.—Spies

Art. XXIX. An individual cannot be considered a spy unless, acting clandestinely or under false pretences, he obtains, or seeks to obtain, information in the zone of a belligerent's operations, with intent to communicate it to the opposite party. Military persons, therefore, who, not being in disguise, have penetrated into the zone of operations of the enemy's army, with a view to obtain information. are not to be considered as spies. In the same manner military persons or civilians charged with the conveyance of despatches to their own army or to that of the enemy, and executing their mission openly, are not to be considered as spies. To this class belong, also, persons who are sent in balloons to transmit despatches, and, in general, to keep up communications between separated parts of an army or territory.

Art. XXX. A spy taken in the act cannot be punished without a preliminary trial.

Art. XXXI. A spy who, having rejoined the army to which he is attached, is subsequently captured by the enemy, shall be treated as a prisoner of war, and shall incur no liability for his previous acts of espionage.

Chapter III.—Flags of Truce

Art. XXXII. An individual who is authorized by one belligerent to enter into communication with the other, and who presents himself with a white flag, is regarded as the bearer of a flag of truce. He has the quality of inviolability, as do the trumpeter, bugler, or drummer, and the flag-bearer and interpreter who accompany him.

Art. XXXIII. The commander to whom a flag of truce is sent is not obliged to receive it under all circumstances. He may take

all necessary measures to prevent the bearer of the flag from profiting by his mission to obtain information. He has the right, in case of abuse, to detain the bearer of the flag temporarily.

Art. XXXIV. The bearer of a flag of truce forfeits his quality of inviolability if it is proved, in a positive and unexceptionable manner, that he has profited by his privileged position to provoke or to commit an act of treachery.

Chapter IV.—Capitulations

Art. XXXV. Articles of capitulation entered into between the contracting parties are to take into account the rules of military honor. Once decided upon, these capitulations are to be scrupulously observed by both parties.

Art. XXXVI. An armistice suspends the operations of war by mutual agreement of the belligerent parties. If its duration is not fixed, the belligerent parties may resume operations at any time, provided, however, that the enemy is warned, at the time agreed upon, in conformity with the conditions of the armistice.

Art. XXXVII. The armistice may be either general or local. The first suspends the military operations between the belligerent states everywhere; the second suspends such operations only as to certain fractions of the belligerent armies and in a determined radius.

Art. XXXVIII. The armistice should be notified, officially and in due course, to the proper authorities and to the troops. Hostilities are suspended immediately after the notification or at the time agreed upon.

Art. XXXIX. It depends on the contracting parties to fix in the clauses of the armistice the relations which may exist with the population and with each other in the theatre of war.

Art. XL. Every serious violation of the armistice by either party gives to the other the right to disavow the same, and even, in case of urgency, to resume hostilities immediately.

Art. XLI. The violation of the provisions of an armistice by individuals, acting on their own initiative, confers the right only to demand the punishment of the offenders, and, if need be, an indemnity for the damage sustained.

SECTION III.—MILITARY AUTHORITY IN THE TERRITORY OF THE ENEMY

Art. XLII. Territory is regarded as occupied when it finds itself placed in fact under the authority of the hostile army. The occupation includes only the territory where that authority is established and in a position to be exercised.

Art. XLIII. The lawful authority having passed, in fact, into the hands of the occupant, he will take all steps which depend upon him with a view to re-establish order, as far as possible, by respecting, save in case of absolute impediment, the laws in force in the country.

Art. XLIV. It is forbidden to compel the population of an occupied territory to take part in military operations against their own country.

Art. XLV. It is forbidden to constrain the population of an occupied territory to recognize, by the taking of an oath, the power of the enemy.

Art. XLVI. Family honor and rights, the lives of individuals and their private property, as well as their religious convictions and the right of public worship, are to be respected. Private property is not to be confiscated.

Art. XLVII. Pillage is expressly prohibited.

Art. XLVIII. If the occupant collects in the occupied territory the imposts, duties, and tolls established for the benefit of the state, he shall do so, as far as possible, in accordance with existing rules of assessment and apportionment, and the obligation shall devolve upon him of providing for the expenses of the administration of the occupied territory in the proportion to which the legal government was bound to contribute.

Art. XLIX. If, in addition to the imposts contemplated in the preceding article, the occupant levies other money contributions in the occupied territory, he can do so only to the extent of the needs of the army or the administration of the occupied territory.

Art. L. No collective penalty, pecuniary or otherwise, shall be imposed upon communities because of individual acts for which they could not be regarded as collectively responsible.

Art. LI. No contribution shall be collected save in virtue of an order given in writing, and on the responsibility of a general-in-chief. This method of collection shall be resorted to only in accordance

with the existing rules of assessment and apportionment. For every contribution a receipt shall be given to the contributor.

Art. LII. Requisitions in kind and compulsory service shall be demanded only of communities or inhabitants for the needs of the army of occupation. They shall bear relation to the resources of the community, and shall be of such nature as not to imply an obligation on the part of the population to take part in military operations against their own country.

These requisitions and services shall be demanded only with the authority of the commander of the occupied locality. Levies in kind shall, as far as possible, be paid for in cash; if not, they shall be verified by receipts.

Art. LIII. The army which occupies a territory can seize only the cash, funds, and bills receivable, properly belonging to the state itself, means of transportation, depots of arms, magazines, and supplies, and, in general, all movable property of the state which may be useful in military operations.

Railway material, land telegraphs, telephones, steamers, and other vessels outside the cases regulated by the maritime law of war, as well as depots of arms, and, in general, all sorts of munitions of war, even when belonging to corporations or private individuals, are equally things susceptible of use in military operations, but shall be restored, and indemnifications shall be agreed upon at the establishment of peace.

Art. LIV. Railway material coming from neutral states, whether the property of such states or of corporations or private individuals, shall be sent back as soon as possible.

Art. LV. The occupying state shall regard itself only as the administrator of the occupied territory, and as in enjoyment of the usufruct of the public buildings, landed estates, forests, and agricultural interests belonging to the state. It shall be his duty to protect the capital of these properties, and to administer them in accordance with the principles of usufruct.

Art. LVI. Town property and the property of establishments consecrated to religious worship, to charity and education, and to the arts and sciences, even when belonging to the state, shall be treated as private property. All seizure, destruction, or intentional defacement of such establishments, of historical monuments, of works of art or of science, is prohibited, and the offenders shall be prosecuted.

SECTION IV.—BELLIGERENTS INTERNED AND WOUNDED CARED FOR IN NEUTRAL TERRITORY

Art. LVII. The neutral state which receives in its territory troops belonging to the belligerent armies shall intern them whenever possible at a distance from the theatre of war. It may detain them in camps, and may even confine them in fortresses or other places adapted to the purpose. It shall decide whether the officers are to be set free, on giving their paroles not to quit the neutral territory without authority.

Art. LVIII. In the absence of a special agreement, the neutral state shall furnish the interned troops with subsistence and clothing and the relief demanded by humanity. Indemnification shall be made, when peace is declared, for the expenses occasioned by the internment.

Art. LIX. A neutral state may authorize the passage over its territory of the sick and wounded belonging to the belligerent armies, subject to the qualification that the trains which carry them shall convey neither the *personnel* nor material of war. In such case a neutral state is bound to resort to such measures of security and control as are necessary to accomplish this result.

Sick and wounded brought into neutral territory, under such conditions, by one of the belligerents, and who may belong to the adverse party, shall be held by the neutral state in such a manner that they cannot again take part in the operations of war. The latter shall have the same obligations in respect to the sick and wounded as are provided for in the former case.

Art. LX. The Geneva Convention applies to the sick and wounded interned in neutral territory.

AGREEMENT CONCERNING THE LAWS AND USAGES OF WAR ON LAND

Art. I. The high contracting parties shall issue instructions to their armed land forces which shall be in conformity to the Rules concerning War on Land annexed to the present Convention.

Art. II. The provisions contained in the rule contemplated in Article I. are obligatory only upon the contracting powers in the event of war between two or more of them. These provisions shall cease to be binding from the instant at which, in a war between

contracting powers, a non-contracting power shall be associated with one of the belligerents.

Art. III. The present Convention shall be ratified with the least possible delay. The ratifications shall be deposited at The Hague. On the deposit of each ratification a minute shall be prepared, one copy of which, properly certified, shall be transmitted, through diplomatic channels, to each of the contracting powers.

Art. IV. Non-signatory powers are permitted to become parties to this Convention. For that purpose they shall make known their acceptance to the contracting powers, by means of a notification in writing, addressed to the government of the Netherlands, and communicated by that government to the other contracting powers.

Art. V. If it should happen that one of the high contracting parties should disavow the present Convention, such disavowal shall not become operative until a written notification thereof shall have been made to the government of the Netherlands, and immediately communicated by the latter to all of the other contracting powers. This disavowal shall become operative only in so far as it concerns the power which shall have given notice of it.

Executed at The Hague, on the 29th day of July, 1899, in an original which shall remain on deposit in the archives of the government of the Netherlands, and of which duly certified copies shall be submitted to the contracting powers through diplomatic channels.

AGREEMENT FOR THE ADAPTATION OF MARITIME WARFARE TO THE RULES OF THE GENEVA CONVENTION OF AUGUST 22 1864.

Art. I. Military hospital ships—that is, ships constructed or fitted out by states especially and solely with a view to give assistance to the sick, wounded, and shipwrecked—the names of which shall have been communicated to the belligerent powers at the opening or during the continuance of hostilities, and, in every case, before being placed in service, are to be respected and may not be captured during the continuance of hostilities. These vessels are not assimilated to ships-of-war in matters pertaining to their sojourn in neutral ports.

Art. II. Hospital ships equipped, wholly or in part, at the expense of private individuals, or aid societies which have been offi-

cially recognized, are equally to be respected and exempted from capture, if the belligerent power to which they are attached has given them an official commission, and has notified their names to the adverse power at the opening of hostilities, or during their progress, but in every case before being placed in service. These ships shall carry a document, from competent authority, declaring that they have been subjected to its inspection during their equipment and at their final departure.

Art. III. Hospital ships, equipped wholly or in part at the expense of private individuals, or of societies officially recognized by neutral states, are to be respected and exempted from capture if the neutral power to which they are subject issues commissions to them and notifies their names to the belligerent powers at the outbreak of hostilities or during their continuance, but in all cases before being placed in service.

Art. IV. Ships mentioned in Articles I., II., and III. shall carry aid and assistance to the sick, wounded, and shipwrecked individuals of the belligerent armies without distinction of nationality. The governments agree not to use these ships for any warlike purpose. These ships shall not embarrass in any manner the movements of the combatants. During and after the combat they shall act at their own risk and hazard. Belligerents shall have the right to visit and inspect them; they may refuse assistance to them, or require them to remove to a distance, or impose upon them a fixed sailing course, and may place a commissioner on board; they may even detain them if circumstances demand it. As far as possible orders given by belligerents to hospital ships shall be entered in their log-books.

Art. V. Military hospital ships shall be distinguished by an exterior coloring of white with a green horizontal band of about one metre and a half in width. Ships mentioned in Articles II. and III. shall be distinguished by an exterior coloring of white with a red horizontal band of about one metre and a half in width. The small boats of the ships just mentioned, as well as the small boats which may be employed in hospital service, shall be distinguished by similar painting. All hospital ships shall be recognized by hoisting with their national flags the red cross emblazoned upon the white flag, as prescribed by the Geneva Convention.

Art. VI. Commercial vessels, yachts, or neutral small boats conveying or receiving sick, wounded, or shipwrecked persons are not

liable to capture for engaging in such transport; but they remain liable to capture for any violations of neutrality which they may have committed.

Art. VII. The *personnel* of the medical and hospital service, including chaplains, of every captured vessel, is inviolable and cannot be made prisoners of war. They carry away with them, on quitting the ship, the surgical instruments and appliances which are their personal property. These persons shall continue to perform their functions so long as may be necessary, and they may be withdrawn when the commander-in-chief deems such withdrawal possible. Belligerents are to secure to such persons who may fall into their hands the full enjoyment of their salaries.

Art. VIII. Persons in the military or naval service, to whatever nation they may belong, who are sick, wounded, or shipwrecked, shall be protected and cared for by their captors.

Art. IX. Sick, wounded, and shipwrecked persons in the service of a belligerent who fall into the hands of the enemy become prisoners of war. It is for the enemy to decide, according to the circumstances of the case, whether it is expedient to hold them, to send them to a port of their own nation, or to a neutral port, or even to a port of the enemy. In the last case the prisoners so returned to their country cannot serve during the continuance of the war.

Art. X. Sick, wounded, or shipwrecked persons who are sent to a neutral port, with the consent of the local authority, shall, unless a contrary arrangement be entered into between the neutral state and the belligerents, be subjected to such restraint by the neutral state that it will be impossible for them to again take part in the operations of the war. The expenses of hospital treatment and internment of the sick, wounded, and shipwrecked shall be borne by the state to which they belong.

Art. XI. The rules contained in the foregoing article are obligatory only upon the contracting powers in the event of war between two or more of them. The said rules shall cease to be obligatory from the instant when, in a war between contracting powers, a non-contracting power joins one of the belligerents.

Art. XII. The present Convention shall be ratified with the briefest possible delay. The ratifications shall be deposited at The Hague; a minute shall be prepared, on the deposit of each ratifica-

tion, of which a properly authenticated copy shall be transmitted, through diplomatic channels, to each of the contracting powers.

Art. XIII. Non-signatory powers who have accepted the Geneva Convention of August 22, 1864, are permitted to adhere to this Convention. To that end they shall make known their adhesion to the contracting powers by a notification in writing, addressed to the government of the Netherlands, and communicated by it to all of the other contracting powers.

Art. XIV. If it should happen that one of the high contracting parties should disavow the present Convention, such disavowal shall not become operative until one year after it shall have been notified, in writing, to the government of the Netherlands and immediately communicated by the latter to all of the other high contracting powers. This disavowal shall be operative only in respect to the power which shall have given notice of it.

Done at The Hague this 29th day of July, 1899.

DECLARATIONS OF THE PEACE CONFERENCE AT THE HAGUE

I.—Throwing Projectiles and Explosives from Balloons

Declaration.—The contracting powers agree, for a period of five years, to forbid the throwing of projectiles and explosives from balloons or by other new methods of a similar nature.[1]

II.—Projectiles which Diffuse Asphyxiating Gases

Declaration.—The contracting powers agree to forbid the employment of projectiles which have for their sole purpose the diffusion of asphyxiating or deleterious gases.[2]

III.—Use of Expanding Projectiles

Declaration.—The contracting powers agree to forbid the employment of bullets which expand[3] or flatten easily in the human

[1] This declaration, which was unanimously agreed to, contains the same provisions in respect to the parties to its operation and the same requirements as to ratification, adhesion, and disavowal as the Convention regarding the Laws and Usages of War on Land adopted by the same conference. See Articles I. to V., pp. 560, 561, *ante*.

[2] Not accepted by England and the United States. See note 1, *supra*.

[3] The expansive action of small-arm projectiles, which is described in the French text of the Convention by the

body, such as bullets the jackets of which do not entirely cover the core or are provided with incisions.[1]

term *s'épanouissent*, is, perhaps, more accurately described by the use of the term "to mushroom," which has been adopted to explain the exact nature of the injury inflicted by the penetration of the projectile into animal tissues.

[1] Not accepted by England and the United States. See note 1, *supra*. In a report submitted to the Conference by a committee charged with the preparation of a rule interdicting the use of certain objectionable small-arm projectiles in war, two powers, Great Britain and the United States, were recorded as voting against the rule proposed by the committee, and finally adopted by the Conference; but no reasons for their negative votes accompanied the report. As the objections of the powers above named had to do, not with the end proposed, but with the means of attaining that end, an amendment was submitted at a subsequent session of the Conference by Captain Crozier, of the American delegation, in the following terms: "The use of bullets which inflict wounds of useless cruelty—such as explosive bullets, and, in general, every kind of bullet which exceeds the limit necessary for placing a man immediately *hors de combat*—should be forbidden." The reasons advanced by Captain Crozier in support of his amendment may be summarized as follows: The proposition of the committee is based upon the mechanical construction of a particular bullet, and upon the injury which is believed to follow its use—that is, the prohibition extends to "bullets which expand or flatten easily in the human body, such as jacketed bullets, of which the jacket does not entirely cover the core, or contains incisions." The rule of war applicable to the case in point is an old one and permits of the infliction of just so much injury to an individual combatant as will suffice to place him immediately *hors de combat*. Just this amount of injury, and no more, is lawful; anything beyond this is unauthorized. The St. Petersburg Conference added nothing to the scope of this rule, which had long been understood and applied by modern states in the conduct of military operations. It, therefore, rested with a simple restatement of the rule, and, in its declaration upon the subject, placed an express prohibition upon the only small-arm projectile then known—the explosive bullet—which was calculated to inflict needless or unnecessary injury. If this were all, there would be no need at this time to attempt to extend the scope of the rules regulating the infliction of injury upon individual combatants in time of war, or to place a limitation upon the field of development or invention. The general adoption of the small-caliber bullet, however, operates to reopen the question to some extent and makes it necessary in the interest of humanity to place some restriction upon the development of small-caliber projectiles; and the need of a restriction in this regard grows out of the very nature of the small-caliber projectile itself. A bullet accomplishes its purpose, of placing a man *hors de combat*, by the shock which follows its impact upon the human body. This shock depends upon the might and velocity of the projectile, and, to an appreciable extent, upon its form and construction as well. The old form of bullet easily accomplished this purpose; the new small-arm bullet does not—certainly in all cases; and the shock attending its impact may be, and in some well-authenticated instances has been known to be, so slight as to fail to place the individual *hors de combat*. To increase this effect, therefore, so as to bring it up to the limit allowed by the rules of civilized warfare, it is necessary to add to the shock of impact by increasing the severity of the wound inflicted by the small-caliber projectile; and it is in connection with such an increase in its wounding power that the need of a rule becomes immediately apparent. The rule suggested by Captain Crozier makes the nature and extent of the injury inflicted by the bullet the

RECOMMENDATIONS OF THE PEACE CONFERENCE AT THE HAGUE, ADOPTED JULY 29, 1899

The Conference is of opinion that the limitation of the military burdens which now weigh so heavily upon the world is highly desirable for the enlargement of the moral and material well-being of humanity.[1]

I. The Conference, in view of the steps already taken by the Federal Government of Switzerland, with a view to the revision of the Geneva Convention, gives expression to the desire that it be succeeded by the meeting of a conference having for its object the revision of that Convention.[1]

II. The Conference gives expression to the desire that the question of the rights and duties of neutrals be inscribed on the programme of the next Conference.[2]

III. The Conference gives expression to the desire that the questions relating to marine artillery and small-arms, such as have been investigated by it, be studied by governments with a view to reach an understanding in respect to new types and calibers.[2]

IV. The Conference gives expression to the desire that governments, taking account of the propositions made to the Conference, should study the possibility of an understanding in respect to the limitations of military and naval forces and war budgets.[2]

V. The Conference gives expression to the desire that the proposition having for its object the inviolability of private property in maritime warfare should be referred to a future conference for investigation.[2]

VI. The Conference gives expression to the desire that the proposition to regulate the question of the bombardment of ports, towns, villages, by naval forces should be referred to a future conference.[2]

test of conformity to the rule; the proposition submitted by the committee restricts the test to a particular mechanical construction, or to a "bullet which expands or flattens easily in the human body"; any other method of increasing the shock, which avoids the conditions above stated, may be adopted by a signatory party without transgressing the technical requirements of the rule proposed by the Conference. It is greatly to be regretted that a proposition drawn upon the lines laid down by Captain Crozier in his amendment was not adopted by the Conference, with the addition, if need be, of such general terms of description as would prohibit the use in war of any small-caliber projectile which is calculated to inflict wounds of needless or unnecessary cruelty.

[1] This resolution was unanimously agreed to.

[2] Agreed to by the Conference with some abstentions from voting.

APPENDIX F

THE LAWS OF WAR ON LAND

RECOMMENDED FOR ADOPTION BY THE INSTITUTE OF INTERNATIONAL LAW AT ITS SESSION IN OXFORD, SEPTEMBER 9, 1880

HISTORY

At the Brussels session of the Institute, in 1879, a commission of fifteen members was appointed to prepare a code, or manual, of the rules of war on land. The task of collecting the materials and preparing the proposed code was intrusted to M. Gustave Moynier, of Geneva, Switzerland, the president of the International Society for the Relief of the Wounded in Time of War. The selection of M. Moynier for this purpose was a most fortunate one in every respect; and he addressed himself to his task with so much zeal and intelligence that, in February of the following year, he was able to submit to his colleagues a draft of the proposed manual. The rules prepared by M. Moynier were based upon the following authorities:

(*a.*) The Instructions for the Government of Armies in the Field, prepared by Dr. Francis Lieber at the request of the United States Government.

(*b.*) The Geneva Convention of August 22, 1864.

(*c.*) The Additional Articles of the Geneva Convention of October 20, 1868.

(*d.*) The Declaration of St. Petersburg of November 4–16, 1868.

(*e.*) The Declaration of Brussels of 1874.

(*f.*) The Official Manuals recently adopted by the governments of France, Russia, and Holland.

The code thus prepared was submitted to the members of the commission for examination and criticism. As a result the rules were entirely rewritten. A number of modifications and amendments suggested by the members were embodied in the work, which was

again submitted to the commission for discussion and final action. It was approved by that body, and recommended for acceptance. On September 9, 1880, it was unanimously adopted by the Institute of International Law. By a later resolution of the Institute, the executive committee was instructed to bring the proposed code to the notice of the different governments of Europe and America, with a view to its adoption as a standard, to which their laws and regulations on the subject should be made to conform.

This manual is the latest, as it is in many respects the best, of the many attempts that have been made to frame a body of rules for the guidance of belligerents in war. In common with those that have preceded it, it possesses certain advantages which may be summarized as follows:

(*a.*) It expresses, with great accuracy and precision, the principles of international law that underlie the rules of war; and states those rules, in considerable detail, as they existed at the date of its preparation.

(*b.*) In stating them, it places upon each the most favorable construction that it is capable of receiving—erring, if at all, upon the side of humanity.

(*c.*) Its publication tends, to a certain extent, to popularize knowledge upon a subject about which too little is known.

(*d.*) By drawing public attention to the existing methods of civilized war, it emphasizes its inevitable hardships and severities, encourages investigation and criticism, and affords an opportunity for their further amendment in the direction of greater humanity.

On the other hand, it is open to serious objections:

(*a.*) No code, or manual, can cover or include all the cases, or novel combinations of circumstances, that are likely to arise in war.

(*b.*) The interests of modern states, and so their military policies, are so diverse as to make it impossible for any rule, or set of rules, to apply to all states, or even to any considerable number of them, in the conduct of their military operations. This is illustrated by the divergent, and in many cases opposing, views upon the subjects of occupied territory, the employment of *levées en masse*, and the like, which are held by states of which England and Russia are the extreme types.

(*c.*) The rules are applied, in time of war, by the commanding generals of opposing armies in the field. Whenever a question

of doubtful application arises, the rules are interpreted and applied to the case in point, not by a dispassionate tribunal, but by a party to the issue. His decision must, from the necessities of the case, be based upon a partial and one-sided representation of the facts in issue; and his ruling can hardly fail to be influenced, to an appreciable extent, by considerations of military policy and self-interest.

(*d.*) An invariable defect in most endeavors of this kind is that they attempt too much, and undertake to frame rules upon subjects as to which there is as yet no unanimity of opinion among modern states. A rule of international law, to receive general acceptance, must be based upon general consent. If the policy of states varies as to a particular usage, it is impossible to frame a rule as to that usage which all states will agree to observe. The rules of the Geneva Convention, and those of the Declaration of St. Petersburg, have received practically unanimous recognition, because they had to do with practices concerning which all states were of the same opinion.[1] The views held by different states as to the rights of military occupation and the government of occupied territory, and upon the subjects of requisitions and contributions of war, are so diverse as to make it impossible to formulate a rule by which any considerable number of them will agree to be bound in the conduct of their military operations.

PART FIRST[2]

General Principles

1. The state of war does not admit of acts of violence, save between the armed forces of belligerent states. Individuals who form no part of a belligerent armed force should abstain from such acts.

This rule implies a distinction between the individuals who compose the armed force of a state and its other citizens or subjects. A precise definition of the term "armed force" is, therefore, necessary.

[1] For discussions of the results of the rules of the Brussels Conference, see vol. xxiii. Revue de Droit Int. pp. 560–577; vol. xxiv. Ibid. pp. 206–212; For. Rel. of the U. S. 1875, pt. ii. pp. 1014–1051.

[2] The text used for purposes of translation is that of the "Institut de Droit International," and will be found in the *Annuaire* of the Institute for 1881, 1882, pp. 157–174.

2. The armed force of a state includes:

1st. The army proper, or permanent military establishment, including the militia and reserve forces.

2d. The national guard, landsturm, free corps, and other bodies which fulfil the three following conditions—*i. e.*,

(*a.*) They must be under the direction of responsible chiefs.

(*b.*) They must have a uniform, or distinguishing mark, or badge, recognizable at a distance, and worn by individuals composing such corps.

(*c.*) They must carry arms openly.

3d. The crews of public armed ships and other vessels used for warlike purposes.

4th. The inhabitants of non-occupied territory, who, at the approach of the enemy, take arms openly and spontaneously to resist an invader, even if they have not had time to organize.

3. Every belligerent armed force must carry on its military operations in accordance with the laws of war.

The only legitimate end that a state may have in war is to weaken the military strength of the enemy.

4. The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy. They are to abstain from all needless severity, as well as from all perfidious, unjust, or tyrannical acts.

5. Agreements made between belligerents during the continuance of war, such as armistices, capitulations, and the like, are to be scrupulously observed and respected.

6. No invaded territory is to be regarded as conquered until the end of the war. Until that time the invader exercises, in such territory, only a *de facto* power, essentially provisional in character.

PART SECOND

APPLICATION OF GENERAL PRINCIPLES

I. HOSTILITIES

(A.) RULES OF CONDUCT WITH REGARD TO INDIVIDUALS

(*a.*) *Inoffensive Populations*

The contest being carried on by "armed forces" only

7. It is forbidden to deal harshly with inoffensive populations.

(*b.*) *Means of Injuring the Enemy*

8. It is forbidden,

(*a.*) To make use of poison, in any form whatever.

(*b.*) To make treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay, or by feigning to surrender.

(*c.*) To attack an enemy by concealing the distinctive signs of an armed force.

(*d.*) To use improperly the national flag, uniform, or other distinctive signs of the enemy; the flag of truce, or the distinctive signs of the Geneva Convention.

9. It is forbidden,

(*a.*) To employ arms, projectiles, or materials of any kind calculated to cause needless suffering, or to aggravate wounds—notably projectiles of less weight than four hundred grammes (fourteen ounces avoirdupois) which are explosive or are charged with fulminating or explosive substances.

(*b.*) To kill or injure an enemy who has surrendered, or who is disabled; or to declare in advance that quarter will not be given, even by those who do not ask it for themselves.

(*c.*) *The Sick and Wounded, and the Sanitary Service*

The following provisions, extracted from the Geneva Convention, exempt the sick and wounded, and the *personnel* of the sanitary service, from many of the needless hardships to which they were formerly exposed:

10. Wounded or sick soldiers shall be collected together and cared for, to whatever nation they may belong.

11. Commanders-in-chief shall have power to deliver, immediately, to the outposts of the enemy, soldiers who have been wounded in an engagement, when circumstances are such as to permit this to be done, and with the consent of both parties. Those who are recognized, after their wounds are healed, as incapable of serving, shall be sent back to their own country. The others may also be sent back, on condition of not again bearing arms during the continuance of the war. Evacuations, together with the persons under whose direction they take place, shall be protected by an absolute neutrality.

12. Persons employed in hospitals and ambulances, composing the staff for superintendence, medical service, administration, transport of wounded, as well as the chaplains, and the duly accredited

agents of relief associations who are authorized to assist the regular sanitary staff, shall participate in the benefit of neutrality while so employed, and so long as there remain any wounded to bring in or to succor.

13. The persons designated in the preceding article should, even after occupation by the enemy, continue to attend, according to their needs, the sick and wounded in the hospital, or ambulance, to which they are attached.

14. When they request to withdraw, the commander of the occupying troops shall fix the time of departure, which he shall only be allowed to delay, for a short time, in case of military necessity.

15. Suitable arrangements should be made to assure to neutralized persons, who have fallen into the hands of the enemy, the enjoyment of suitable salaries.

16. An arm-badge (brassard) shall be worn by neutralized individuals, but the delivery thereof shall be regulated by military authority.

17. The commanding generals of the belligerent powers should appeal to the humanity of the inhabitants, and should endeavor to induce them to assist the wounded, by pointing out to them the advantages that will result from so doing. They should regard as inviolable those who respond to this appeal.

(*d.*) *The Dead*

18. It is forbidden to rob or mutilate the bodies of the dead lying on the field of battle.

19. The bodies of the dead should not be buried until they have been carefully examined, and all articles which may serve to fix their identity, such as names, medals, numbers, pocket-books, etc., shall have been secured. The articles thus collected from the bodies of the enemy's dead should be transmitted to their army or government.

(*e.*) *Who May be Made Prisoners of War*

20. Individuals who form a part of the belligerent armed force of a state, if they fall into the hands of the enemy, are to be treated as prisoners of war, in conformity with Articles 61–78 of these instructions. The same rule is observed in the case of messengers who carry official despatches openly; and towards aëronauts

charged with observing the operations of an enemy, or with the maintenance of communications between the various parts of an army or theatre of military operations.

21. Individuals who accompany an army, but who are not a part of the regular armed force of the state, such as correspondents, traders, sutlers, etc., and who fall into the hands of the enemy, may be detained for such length of time only as is warranted by strict military necessity.

(*f.*) *Spies*

22. Spies captured in the act cannot demand to be treated as prisoners of war.

23. An individual may not be regarded as a spy, however, who, belonging to the armed force of either belligerent, penetrates, without disguise, into the zone of military operations of the enemy. Nor does the term apply to aëronauts or to couriers or messengers who carry openly and without concealment the official despatches of the enemy.

24. No person charged with being a spy shall be punished for that offence until the fact of his guilt shall have been established before a competent military tribunal.

25. A spy who succeeds in quitting the territory occupied by an enemy incurs no penalty for his previous offence, should he at any future time fall into the hands of that enemy.

(*g.*) *Flags of Truce*

26. The bearer of a flag of truce who, with proper authority from one belligerent, presents himself to the other for the purpose of communicating with him, is entitled to complete inviolability of person.

27. He may be accompanied by a drummer or trumpeter, by a color-bearer, and, if need be, by a guide and interpreter, all of whom shall be entitled to a similar inviolability of person.

28. The commander to whom a flag is sent is not obliged to receive the flag under all circumstances.

29. The commander who receives a flag has a right to take such precautionary measures as will prevent his cause from being injured by the presence of an enemy within his lines.

30. If the bearer of a flag of truce abuse the trust reposed in him, he may be temporarily detained, and, if it be proven that he has

taken advantage of his position to abet a treasonable act, he forfeits his character of inviolability.

(B.) RULES OF CONDUCT WITH REGARD TO THINGS

(*a.*) *Means of Injuring the Enemy.—Bombardments*

Certain precautions are made necessary by the rule that a belligerent must abstain from useless severity. In accordance with this principle,

31. It is forbidden,

(*a.*) To pillage, even places taken by assault.

(*b.*) To destroy public or private property, unless such destruction be demanded by urgent military necessity.

(*c.*) To attack, or bombard, open or undefended towns.

32. The commander of an attacking force, save in cases of open assault, shall, before undertaking a bombardment, make due effort to give notice of his intention to the local authorities.

33. In case of bombardment all needful measures shall be taken to spare, if it be possible to do so, buildings devoted to religion and charity, to the arts and sciences, hospitals, and depots of sick and wounded. This on condition, however, that such places be not made use of, directly or indirectly, for purposes of defence.

34. It is the duty of the besieged to designate such buildings by suitable marks or signs, indicated, in advance, to the besieger.

(*b.*) *Sanitary Establishments*

The arrangements for the relief of the wounded, which are made the subject of Article 10 *et seq. of the Geneva Convention, would be inadequate to their purpose were not sanitary establishments granted equal protection. Hence, in accordance with the rules of the Geneva Convention,*

35. Ambulances and military hospitals are recognized as neutral, and, as such, are to be protected by belligerents, so long as any sick or wounded remain therein.

36. The same rule applies to buildings, or parts of buildings, in which the sick or wounded are gathered together or cared for.

37. The neutrality of hospitals and ambulances ceases if they are guarded by a military force. This does not preclude the presence of an adequate police force.

38. As the equipment of military hospitals remains subject to the

laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property. Under the same circumstances, an ambulance shall, on the contrary, retain its equipment.

39. Under the circumstances foreseen in the above paragraphs, the term *ambulance* is applied to field hospitals and other temporary establishments which follow the troops on the field of battle to receive the sick and wounded.

40. A distinctive and uniform flag is adopted for ambulances, hospitals, and evacuations. It bears a red cross on a white ground. It must, on all occasions, be accompanied by the national flag.

II. Occupied Territory

(A.) definition

41. Territory is regarded as occupied when, as the consequence of its invasion by the enemy's forces, the state from which it has been taken has ceased, in fact, to exercise there its regular authority, and the invading state alone finds itself able to maintain order therein. The limits within which this state of affairs exists determine the extent and duration of the occupation.

(B.) rules of conduct with respect to persons

42. It is the duty of the occupying military authority to inform the inhabitants, at the earliest practicable moment, of the powers that he exercises, as well as to define the limits of the occupied territory.

43. The occupying authority should take all due and needful measures to assure order and public tranquillity.

44. To that end the invader should maintain the laws in force in the territory in time of peace, and should not modify, suspend, or replace them, unless it becomes absolutely necessary to do so.

45. The administrative officials and civil employees of every grade who consent to continue in the performance of their duties should be supported and protected by the occupying authority. Their appointments are always revocable, and they have the right to resign their places at any time. They should be subjected to penalties only when they fail to perform duties freely accepted by them, and should be given over to justice only when they have betrayed them.

46. In case of urgency, the invader may demand the co-operation of the inhabitants, to enable him to provide for the necessities of local administration.

47. The population of an invaded district cannot be compelled to swear allegiance to the hostile power; but individuals who commit acts of hostility against the occupying authority are punishable.

48. The inhabitants of an occupied territory who do not submit to the orders of the occupying authority may be compelled to do so. The invader, however, cannot compel the inhabitants to assist him in his works of attack or defence, or to take part in military operations against their own country.

49. Family honor and rights, the lives of individuals, as well as their religious convictions, and the right of religious worship should be respected.

(c.) RULES OF CONDUCT WITH REGARD TO PROPERTY

(*a.*) *Public Property*

Although the authority of the invader replaces that of the government of the occupied territory, his power is not absolute. So long as the fate of the territory remains in suspense—that is, until the peace—the invader is not free to dispose of property which still belongs to the enemy, and which is not of direct use to him in his military operations. From these principles the following rules are deduced:

50. The occupying authority may seize only the cash, public funds, and bills due or transferable, belonging to the state in its own right, depots of arms and supplies, and, in general, the movable property of the state, of such character as to be useful in military operations.

51. Means of transportation (railways, boats, etc.), as well as telegraph lines and landing-cables, can only be appropriated to the use of the invader. Their destruction is forbidden, unless it be demanded by military necessity. They are to be restored, at the peace, in the condition in which they are at that time.

52. The invader can only act in the capacity of a provisional administrator in respect to real property, such as buildings, forests, agricultural establishments, etc., belonging to the enemy's state. He should protect these properties and see to their maintenance.

53. The property of communes, and that of establishments devoted to religious worship, and to the arts and sciences, cannot be seized. All destruction, or intentional defacement, of such establishments, of historic monuments or archives, or of works of science or art, is formally prohibited, save when demanded by urgent military necessity.

(*b.*) *Private Property*

If the powers of the invader are limited with respect to the public property of the enemy's state, with greater reason are they limited with respect to the private property of individuals.

54. Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only under the limitations contained in the following articles:

55. Means of transportation (railways, boats, etc.), telegraphs, factories of arms and munitions of war, although belonging to private individuals or corporations, may be seized by an invader, but must be restored at peace; if possible, with suitable indemnities.

56. Impositions in kind (requisitions) levied upon communes or the residents of invaded districts should bear direct relation to the generally recognized necessities of war, and should be in proportion to the resources of the district. Requisitions can only be made, or levied, with the authority of the commanding officer of the occupied district.

57. The invader may levy, in the way of dues and imposts, only such as are already established for the benefit of the state revenues. He employs them to defray the expenses of administration of the occupied territory, contributing in the same proportion in which the legal government was bound.

58. The invader cannot levy extraordinary contributions of money, save as an equivalent for fines, or imposts not paid, or for payments not made in kind. Contributions in money can only be imposed by the order, and upon the responsibility, of the general-in-chief, or that of the superior civil authority established in the occupied territory; and then, as nearly as possible, in accordance with the rule of apportionment and assessment of existing imposts.

59. In the apportionment of burdens relating to the quartering of troops, and in the levying of requisitions and contributions of war, account is to be made of the charitable zeal displayed by the inhabitants in behalf of the wounded.

60. Impositions in kind, when they are not paid for in cash, and contributions of war, are authenticated by receipts. Measures should be taken to assure the regularity and *bona fide* character of these receipts.

III. Prisoners of War

The confinement of prisoners of war is not in the nature of a penalty for crime; neither is it an act of vengeance. It is a temporary detention only, entirely without penal character. In the following provisions, therefore, regard has been had to the consideration due them as prisoners, and to the necessity of their secure detention.

61. Prisoners of war are the prisoners of the captor's government, and not of the individuals or corps who captured them.

62. They are subject to the laws and regulations in force in the army of the enemy.

63. They must be treated with humanity.

64. All articles in their personal possession, arms excepted, remain their private property.

65. Every prisoner of war is obliged to disclose, when duly interrogated upon the subject, his true name and grade. Should he fail to do so, he may be deprived of all, or a part, of the privileges accorded to prisoners of his rank and station.

66. Prisoners of war may be confined in towns, fortresses, camps, or other places, with an obligation not to go beyond certain specific limits; but they may only be imprisoned as an indispensable measure of security.

67. Every act of insubordination on the part of a prisoner of war authorizes the resort to suitable measures of severity on the part of the government in whose hands he is.

68. Prisoners of war attempting to escape may, after having been summoned to halt or surrender, be fired upon. If an escaped prisoner be recaptured before being able to rejoin his own army or to quit the territory of his captor, he is only liable to disciplinary penalties; or he may be subjected to a more rigorous confinement. If, after having successfully effected his escape, he is again made a prisoner, he incurs no penalty for his previous escape. If, however, the prisoner so recaptured, or retaken, has given his parole not to attempt to escape, he may be deprived of his rights as a prisoner of war.

69. The government having prisoners of war in its hands is obliged to support them. If there be no agreement between the belligerents upon this point, prisoners of war are placed, in all matters regarding food and clothing, upon the peace footing of the troops of the state which holds them in captivity.

70. Prisoners cannot be compelled to take any part whatsoever in operations of war. Neither can they be compelled to give information concerning their army or country.

71. They may be employed upon public works that have no direct connection with the captor's military operations; provided, however, that such labor is not detrimental to health, nor humiliating to their military rank, if they belong to the army, or to their official or social position, if they are civilians, not connected with any branch of the military service.

72. In the event of their being authorized to engage in private industries, their pay for such services may be collected by the authority in charge of them. The sums so received may be employed in bettering their condition, or may be paid to them, at their release, subject to deduction, if that course be deemed expedient, of the expense of their maintenance.

IV. Termination of Captivity

The right of detaining individuals in captivity exists only during the continuance of hostilities. Hence:

73. The captivity of prisoners of war ceases, as a matter of right, at the conclusion of peace; but their liberation is then regulated by agreement between the belligerents.

74. Captivity also ceases, in so far as sick or wounded prisoners are concerned, so soon as they are found to be unfit for military service. It is the duty of the captor, under such circumstances, to send them back to their country.

75. During the continuance of hostilities, prisoners of war may be released in accordance with cartels of exchange, agreed upon by the belligerents.

76. Without formal exchange, prisoners may be liberated on parole, provided they are not forbidden by their own government to give paroles. In such a case they are obliged, as a matter of military honor, to perform with scrupulous exactness the engage-

ments which they have freely undertaken, and which should be clearly specified. On its part, their own government should not demand or accept from them any service contrary to, or inconsistent with, their plighted word.

77. A prisoner of war cannot be constrained to accept a release on parole. For a similar reason, the enemy's government is not obliged to accede to the demand of a prisoner of war to be released on parole.

78. Every prisoner of war liberated on parole who is recaptured in arms against the government to which he has given such parole may be deprived of his rights and privileges as a prisoner of war; unless since his liberation he has been included in an unconditional exchange of prisoners.

V. Troops Interned in Neutral Territory

It is universally admitted that a neutral state cannot, without compromising its neutrality, lend aid to either belligerent, or permit them to make use of its territory. On the other hand, considerations of humanity dictate that asylum should not be refused to individuals who take refuge in neutral territory to escape death or captivity. From these principles the following provisions are deduced. They are calculated to reconcile, to some extent, the opposing interests involved.

79. It is the duty of a neutral state within whose territory commands or individuals have taken refuge to intern them at points as far removed as possible from the theatre of war. It should pursue a similar course towards those who make use of its territory for warlike operations or to render military aid to either belligerent.

80. Interned troops may be guarded in camps or fortified places. The neutral state decides whether officers are to be released on parole by taking an engagement not to quit neutral territory without authority.

81. In the event of there being no agreement with the belligerents concerning the maintenance of interned troops, the neutral state shall supply them with food and clothing, and the immediate aid demanded by humanity. It also takes such steps as it deems necessary to care for the arms and other public property brought into its territory by the interned troops. When peace has been concluded, or sooner if possible, the expenses occasioned by the intern-

ment are reimbursed to the neutral state by the belligerent state to whom the interned troops belong.

82. The provisions of the Geneva Convention of August 22, 1864 (Articles 10–18, 35–40, 59 and 74 above given), are applicable to the sanitary staff, as well as to the sick and wounded, who take refuge in, or are conveyed to, neutral territory.

83. Evacuations of sick and wounded not prisoners of war may pass through neutral territory, provided the *personnel* and material accompanying them are exclusively sanitary. It is the duty of the neutral state through whose territory the evacuation is made to take such measures of safety and necessary control as it may deem necessary to the rigorous performance of its neutral duty.

PART THIRD

Penal Sanction

If any of the foregoing rules be violated, the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are.

84. Offenders against the laws of war are liable to the punishments specified in the penal, or criminal, law.

This mode of repression, however, is only applicable when the person of the offender can be secured. In the contrary case, the criminal law is powerless, and, if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other resource remains than a resort to reprisals. Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy. This necessary rigor, however, is modified to some extent by the following restrictions:

85. Reprisals are formally prohibited in all cases in which the injury complained of has been repaired.

86. In all cases of serious importance in which reprisals appear to be absolutely necessary, they shall not exceed, in kind or degree, nor in their mode of application, the exact violation of the law of war committed by the enemy. They can only be resorted to with the express authority of the general-in-chief. They must conform, in all cases, to the laws of humanity and morality.

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